United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

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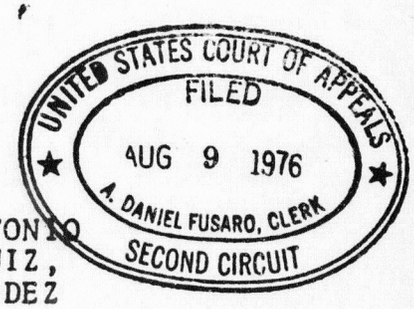
76-7275

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

SEPTEMBER TERM, 1976

76-7275



GILBERTO GERENA VALENTIN, JOSE ANTONIO APONTE VAZQUEZ, JORGE B. FLORES-RUIZ, CARLOS REYES LOPEZ, and JOSEPH MENDEZ RIVERA,

Appellants,

PAN AMERICAN WORLD AIRWAYS, INC., and EDWIN GLASSER,

Appellees.

PAGINATION AS IN ORIGINAL COPY

JOINT APPENDIX

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D. [illegible] 73C 1552 DOCKET

APPEAL

BRUCHHAUSEN, J.

TITLE OF CASE

GILBERTO GERENA VALENTIN,
JOSE ANTONIO APONTE VAZQUEZ,
GEORGE B. FLORES RUIZ,
CARLOS REYES LOPEZ and
JOSEPH MENDEZ RIVERA,
vs.
PAN AMERICAN AIRWAYS, EDWIN H.
GIASSER,

BASIS OF ACTION: CIVIL RIGHTS
SEEKS: $1,500,000.00

URY TRIAL CLAIMED
ON

ATTORNEYS

For Plaintiff:

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FERDINAND RIVERA ORTEGA
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For: PAN AM: HAIGHT,
GARDNER, POOR & HAVENS
1 State Street Plaza
New York, N.Y. 10004
344-6800

DATE	PLAINTIFF'S ACCOUNT	RECEIVED		DISBURSED		DATE	DEFENDANT'S ACCOUNT	RECEIVED		DISBURSED	
0-18-73	Cause on trans. no fee										
-15-76	Notice of appeal	5	—								
16-76	Paid TO Treas.			5	—						
-9-76	~~for~~ Notice Appeal	5	—								
10.76	Paid to treas			5	—						

ABSTRACT OF COSTS		
TO WHOM DUE	AMOUNT	

RECEIPTS, REMARKS, ETC.

BEST COPY AVAILABLE

73C 1552 VALENTIN et al vs. PAN AMERICAN AIRWAYS, et a

DATE	FILINGS- PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS	
18-73	Cause on Transfer from the district court of Puerto Rico. Ackowledgment receipt mailed to clerk filed.	1	JS5
19-73	Notice to take deposition of Carlos Reyes Lopez filed.	2	
19-73	Notice to take deposition of Joseph Mendez Rivera filed.	3	
19-73	Notice to take deposition of George B. Flroes Ruiz filed.	4	
19-73	Notice to take deposition fo Jose Antonio Aponte Vazquez filed.	5	
19-73	Notice to take deposition of Gilberto Gerena Valentin filed.	6	
3/73	By BRUCHHAUSEN, J.- Order dated 12/3/73 filed consenting for attys to change (for deft)	7	
4-74	Notice of motion to strike pltff's complaint ret. 1-29-74 @ 10:00 A.M. filed.	8	
29-74	Before BRUCHHAUSEN, J. - Case called for hearing on defts' motion to strike pltffs' complaint. Motion granted as to alternative relief requested in deft Pan Am's notice of motion dtd 1-9-74. Pre-trial conference adj'd to 4-15-74.		
-74	Affidavit of Gilberto Gerena Valentin in opposition to the motion to strike the complaint filed.	9	
/74	Notice of deft to take deposition of pltff J. Rivera filed.	10	
/74	Notice of deft to take deposition of pltff C. Lopez filed.	11	
/74	Notice of deft to take deposition of pltff George Ruiz filed.	12	
/74	Notice of deft to take deposition of pltff G. Valentin filed.	13	
/74	Notice of deft to take deposition of pltff J. Vazquez filed.	14	
-74	By BRUCHHAUSEN, J. - Memorandum and order dtd 2-5-74 adjourning deft's motion to dismiss complaint to 3-5-74 at 10A.M. filed.	15	
4-74	Before BRUCHHAUSEN, J. - Case called & adjd. to 3-11-74.	-----	
4-74	Supplementary affadavit in connection with deft's motion to strike pltff's complaint and memorandum of law filed.	16/17	
/74	Affidavit of Lorenzo F. Padilla in Opposition to the instant application of the defts filed.	18	
1-74	Before BRUCHHAUSEN, J. - Case called. Deft's motion to dismiss complaint submitted. Decision reserved.	----	
4-74	By BRUCHHAUSEN, J.- Memorandum and order dtd 3-14-74 directing pltffs to respond to all questions propounded in depositions filed.	19	
19-74	By BRUCHHAUSEN, J. - Supplemental memorandum and order dtd 3-18-74 directing pltffs to respond to all questions in the depesitions filed.	20	

CIVIL DOCKET 73 C 1552 G. VALENTIN VS. PAN AMER. AIRWAYS, ET ANO

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTED IN EMOLUMENT RETURNS
/1/74	Notice to take deposition of pltff Jose Antonio Aponte Vazquez filed.			21
/1/74	Notice to take deposition of pltff Joseph Mendez Rivera filed.			22
/1/74	Notice of taking of deposition of pltff G. Gerena Valentin filed.			23
/1/74	Notice of taking of deposition of pltff Carlos Reyes Lopez filed.			24
4-3-74	Noticeeof motion for an order granting pltffs an enlargement of time for depositions ret 4-8-74 at 10 A.M. filed.			25
/4/74	Affidavit in Opposition to pltffs motion filed			26
19/74	Notice of Motion to strike the complaint of pltff Joseph Mendez Rivera filed.,ret. 4/29/74			27
29-74	Before BRUCHHAUSEN, J. - Case called. Defts' motion to strike complaint of pltff. G.M. Rivera submitted. Decision reserved.			---
-29-74	Application Of Lorenzo Padilla for extension for preparation & submission of response & opposition to 5-15-74 filed.			28
-21-74	Reply affidavit of William J. Junkerman filed.			29
6-5-74	By BRUCHHAUSEN, J. - Memorandum & order dtd. 5-3-74 that pltff apnear for taking of continued denosition on 6-13-74 @ 11 A.M. etc. filed. Copies mailed to attys			30
7-15-74	Copy of letter from William J. Junkerman dtd 7-9-74 filed.			31
12-4-74	Notice of Motion ret December 9, 1974 for an order directing pltffs atty to return to attys for the deft the original transcripts of the examinations before trial filed.			32
2/9/74	Affidavit of William J. Junkerman filed.			33
2/9/74	By BRUCHHAUSEN,J.- Orderdated 12/9/74 filed that the deft Pan American World Airways , INC 's motion is granted and that pltff's atty is directed to deliver to this court no later than in 48 hours after receipt of a copy of this order certain transcripts of depositionsof certain individuals (see Order)			34
/9/74	Before BRUCHHAUSEN,J.- Case called- Deft's motion directing pltff's attys to return original transcripts of the examinations, etc. granted-Submit order			
10/74	Notice of Entry filed.			35
-13-74	Notice of entry filed.			36
/16/74	Before BRUCHHAUSEN,J.- Case called- Pltff's failed to appear- Deft moves for a dismissal of complaint-Motion granted- Submit decree			
/17/74	Application of Lorenzo F. Padilla filed.			37

... AIRWAYS, et ano

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REPORTER'S & EXAMINER'S FEES
12-19-74	Affidavit of William J. Junkerman in support of award of attys' fees, etc. filed.			
12-19-74	BRUCHHAUSEN, J. - Findings of Fact and Conclusions of Law filed.			38
12-19-74	BRUCHHAUSEN, J. - JUDGMENT dtd 12-19-74 dismissing complaint and allowing deft Pan American World Airways to recover of pltffs $14,291.25 filed.(p/c mailed to attys).			39
12-19-74	Notice of entry and filing filed. (Judgment)			40
12-19-74	Notice of entry and filing filed. (Findings of fact and conclusions of law)			41
1/24/75	Stenographer's transcript of 12/16/74 filed.			42
12 -75	Notice of Motion, ret. 12/19/75 filed re: to set aside the judgment , etc.			43
12-17-75	Memorandum of Law in opposition to pltff's motion to set aside judgment filed. (mg)			4
12-17-75	Affidavit in opposition filed. (mg)			4
12 -75	Before BRUCHHAUSEN, J. - Case called for hearing on pltff's motion to set aside judgment. Motion argued. Court denied the motion.			4
12/19/75	...,J.- Order dated 12/19/75 filed that motion to ... judgment, etc. be ...ied.(on Doc.#44)			
1-15 -76	Notice of appeal filed. Duplicate mailed to C of A & defts. in			47
2 4	Above record certified and mailed to the C of A .			
2 -76	Acknowledgement received from C of A for receipt of record on appeal filed.			
3 -76	...of judgment dismissing the appeal filed			48
3 -76	... mailed to C of A for receiopt of file.			4
5 -76	Notice of motion to set aside the judgment etc. ret. 5-21-76 at 10:... filed.			
5 -76	Memorandum of law in support of Plaintiffs' Motion to set aside judgment filed.			50
5 -76	... of Law filed.			51
5 -76	... William J. Junkerman filed.			
5 -76	...vit of L. Padilla filed.			
5 -76	...M.J.- Case called for pltff's motion to set ... Motion argued and denied So ordered			
5-24-76	...,J.- Order dtd. 5-21-76 denying motion to set aside ... of Doc.# 50.			
6-9-76	... filed. Copies to adv. and C of A			

A-4

A TRUE COPY
ATTEST
DATED June 9 1976
LEWIS ORGEL

Complaint

T R A N S L A T I O N

IN THE SUPERIOR COURT OF PUERTO RICO

SAN JUAN PART

GILBERTO GERENA VALENTIN, JOSE ANTONIO APONTE VAZQUEZ, GEORGE B. FLORES RUIZ: CARLOS REYES LOPEZ and JOSEPH MENDEZ RIVERA, Plaintiffs	CIVIL NO. 73-3609-III
v.	RE:
PAN AMERICAN AIRWAYS, EDWIN H. GALSSER, Defendants.	D A M A G E S

C O M P L A I N T

Comes now plaintiffs through their undersigned attorneys and to the Honorable Court respectfully state and pray:

I

That co-plaintiff Gilberto Gerena Valentin is of legal age, married, citizen of the United States, domiciled in the city of New York, belongs to several civic and political entities and is President of Congreso de Municipalidades Puertorriquenas, Inc., and is an outstanding political, civic and labor leade in said City.

I I

That the other co-plaintiffs are Puerto Ricans, citizens

of the United States, domiciled in the city of New York, where they are employees in different capacities in different enterprises.

III

That Pan American Airways is a public carrier and is engaged in the transportation of passengers and cargo throughout the whole world and particularly between San Juan, Puerto Rico and cities of the United States of America and Edwin H. Glasser is an official (Captain) of said Pan American Airways.

I V

On October 30, 1972, around 10:45 P.M., plaintiffs, who had acquired for it round trip tickets, boarded flight number 296 of party defendant with the intent of returning to the city of New York after having enjoyed a vacation period in Puerto Rico.

V

That co-plaintiffs Jose Aponte and Carlos Reyes initiated a conversation relative to the political, social and economic circumstances of Puerto Rico, which apparently bothered a couple of passengers who were occupying the seat immediately in front of said two (2) co-plaintiffs and, as per information and belief of the co-defendants, said couple stated their discontent to defendant's employees as to the concepts being divulged by the coplaintiffs during the course of their conversation,

for which a Pan American Airways employees, who was in the course of his duties aboard the airplane and whose surname is Carrasquillo, indicated to Aponte and to Reyes that they had to move from their seats and upon they asking the reason for such moving of seats, said employee Carrasquillo insisted that he did not have to give explanations and that they had to move to a seat further on to the front of the airplane, to which the aforementioned co-plaintiffs Aponte and Reyes agreed.

V I

Co-plaintiffs continue to allege that at the time when co-plaintiff Jorge B. Flores Ruiz moved to the seat where co-plaintiffs Aponte and Reyes had moved, employee Carrasquillo again approached them informing them that they had to abandon the airplane, which caused that some passengers of the flight approached the place where these three co-plaintiffs and employee Carrasquillo were carrying on the conversation.

VII

Co-plaintiffs Jose Aponte, Carlos Reyes and Jorge B. Flores, as well as Joseph Mendez Rivera stated to Carrasquillo that they had no objection to abandon the aircraft as long as they were informed who were the persons that complained about them, to which Carrasquillo answered that if they did not abandon the airplane "they would be sorry" and while this was taking place, co-defendant Edwin H. Glasser, Captain of flight

number 296, approached the group and, without stating anything else, stated to plaintiffs that they had to abandon the airplane, to which they objected until they were informed of the reason for such drastic action of the part of Captain Glasser and of employee Carrasquillo.

VIII

Co-plaintiffs continue to allege that also intervened at this point of the conversation another employee of co-defendant Pan American Airways by the name of Nestor Martinez, who informed them that the ones who had complained about them were two "Dominican ladies" but that they did not know their names.

I X

Meanwhile co-defendant Glasser continued insisting that co-plaintiffs Jose Aponte, Carlos Reyes, Jorge B. Flores and Joseph Mendez Rivera had to abandon the airplane without any more explanations or on the contrary he would have them arrested for intervening with the flight, while co-plaintiffs argued that they had purchased a round trip ticket; that they did not desire to continue with the incident and what was happening was that employee Glasser was prejudiced with the passengers who were colored and Puerto Ricans, like some of the herein plaintiffs.

X

Upon intervening co-plaintiff Gilberto Gerena Valentin,

the latter indicated to Glasser that there was no reason for his behaviour, to which Glasser answered that he was ordering the airplane be emptied and to cancel the flight if they did not abandon the aforementioned airplane.

X I

At this point of the discussion threatened them "for the last time" to abandon the airplane, because if not, he would have them arrested by the State police or by the F.B.I. Glasser ordered employee Martinez to locate the airport police, which Martinez did bringing with him a Police Sergeant, whose name plaintiffs do not recall.

XII

Glasser insisted in front of said police officer that plaintiffs abandon the airplane, and upon the latter indica ing that their desire was that they be taken to the city of New York, Glasser requested from the police officer to arrest the plaintiffs. While this was taking place, a gentleman approached the group, who identified himself as agent of the F.B.I. by the name of Orr, who indicated that he did not care which was the problem that existed and that they were violating a federal regulation and they would be arrested if they did not abandon the airplane. Plaintiffs argued that their civil rights were being violated and they were not interested in getting into a violence incident and that they only desired to get to their

homes, as soon as possible, in the city of New York.

XIII

The State Police Sergeant informed plaintiffs that they were under arrest and that two (2) policemen would escort them out of the airplane, which was done with the five (5) plaintiffs. Upon getting out of the airplane, escorted by the police, several photographers and television and radio commentators were on the runway, who asked plaintiffs if they were trying to kidnap the airplane, as had been rumored, which was immediately denied by plaintiffs.

XIV

Plaintiffs were interrogated by two (2) F.B.I. agents by the name of Richard J. Gillette and George M. Maloney, after which they were taken before the Honorable District Judge Federico Montanez, who after hearing the evidence did not find probable cause to accuse the herein plaintiffs and he ordered that they be freed. When plaintiffs were leaving the District Court, agents Gillette and Maloney informed them that they were again under arrest, on this occasion for a Federal offense and they were taken to the central offices of the F.B.I. in Pan American Building in Santurce. At this place plaintiffs were detained until 7:00 A.M. of the following day, when they were taken to the Federal Building in San Juan to the offices of the Marshal, were they were processed and locked up in a cell lo-

cated in said office of the U. S. Marshal.

XV

Around 1:00 P.M. of October 31, 1972 they were taken to the Superior Court, Criminal Part, where Superior Judge Charles Figueroa accused them of violations to the Federal statute and he set a $5,000.00 to each one of the herein plaintiffs. Upon not having resources to comply with said bond requirement, plaintiffs were taken to the San Juan District Jail (La Princesa), where plaintiffs, with the exception of plaintiff Gilberto Gerena Valentin, were incarcerated for three days, having plaintiff Gilberto Gerena Valentin been freed the following day after having been incarcerated after a hearing before the Hon. Hiram R. Cancio, Chief Judge of the U. S. District Court, who ordered that said co-plaintiff be set free with certain limitations.

XVI

As to co-plaintiffs Jose Antonio Aponte Vazquez, Jorge B. Flores Ruiz, Carlos Reyes Lopez and Joseph Mendez Rivera, after being incarcerated for three (3) days at La Princesa, were taken before the Honorable Judge Hiram R. Cancio, who after hearing their arguments, through their attorneys, ordered they be set free with certain restrictions until another judicial action was taken to that respect.

In this manner all the plaintiffs were able to be set

free and return to their homes in the city of New York, United States of America.

XVII

Plaintiffs continue to allege that the accusations against them for alledged violations to U.S.C. Title 49, Section 1442-j, was opportunely brought before the consideration of the Federal Grand Jury, who, after considering the evidence presented by the United States Attorneys, determined to exonerate of all criminal fault and responsibility the herein plaintiffs. In this respect plaintiffs add, and in good faith believe, from information and belief, that said exoneration was due to the fact that the U. S. Attorneys themselves admitted to the Grand Jury that they did not have enough evidence against plaintiffs and that neither the facts, which were imputed to them, constituted a federal offense or of any other kind.

XVIII

Plaintiffs enjoy a good repurtation as citizens in the city of New York as well as In Puerto Rico and are members of civic and political entities, specially co-plaintiff Gerena Valentin, who, as has been previously stated, is President of Congreso de Municipalidades Puertorriquenas, Inc., and co-defendants Glasser and Pan American Airways have exposed them and continue to expose them to the scorn, hatred and discredit of their fellow citizens in Puerto Rico as well as in the city

of New York, having been greatly injured the good name, reputation and general esteem of the plaintiffs in said city of New York and before their fellow citizens, relatives and friends in the Island of Puerto Rico.

XIX

That the arrest and incarceration and other judicial experiences suffered by plaintiffs in this case were the product and sole result of the malicious imputations made in bad faith and without reasonable grounds on the part of defendants against plaintiffs, having said defendants advised, induced, instigated and requested the initiation of judicial proceedings, which culminated with the arrest and incarceration of the plaintiffs, which, as has been stated, terminated without any final judicial action having been taken for being totally and completely exonerated by the Federal Grand Jury of the Federal Court.

XX

As a result of the actions of the defendants herein described, plaintiffs have suffered intense moral pains and mental anguish together with their relatives, wives and children, feeling themselves depressed and their spirits oppressed; all the proceedings filed against them have injured them and continue to injure them in their relations with their employers, fellow citizens in New York and in Puerto Rico and in the dif-

ferent civic and political entities to which they belong. Therefore, plaintiffs estimate that they have suffered damages due to the fault and negligence of the defendants, which amount to the sums stated below:

1.	Gilberto Gerena Valentin	$500,000.00
2.	Jose Antonio Aponte Vazquez	$250,000.00
3.	Jorge B. Flores Ruiz	$250,000.00
4.	Carlos Reyes Lopez	$250,000.00
5.	Joseph Mendez Rivera	$250,000.00

WHEREFORE, it is very respectfully prayed from the Honorable Court that, pursuant to legal proceedings, it sustain this complaint and order defendants to pay to plaintiffs the amounts prayed for in the preceding paragraph with the taxation of costs, expenses and attorneys fees.

At San Juan, Puerto Rico, May 24, 1973.

LUIS G. ESTADES
FERDINAND RIVERA ORTEGA
attorneys for plaintiffs
P. O. Box 1544
Old San Juan
San Juan, Puerto Rico 00903

By: Signed
LUIS G. ESTADES

ANSWER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

GILBERTO GERENA VALENTIN et al., Plaintiffs	/	Civil No. 564-73
V.	/	
PAN AMERICAN WORLD AIRWAYS, INC. and EDWIN H. GLASSER, Defendants	/	CIVIL ACTION

A N S W E R

TO THE HONORABLE COURT:

Comes now codefendant Pan American World Airways through its undersigned attorneys and respectfully states and prays as follows:

I. Admits that coplaintiff Gilberto Gerena Valentin is of legal age, married, an American citizen and domiciled in the City of New York and denies the rest.

II. Admits that the other coplaintiffs are American citizens domiciled in the City of New York and denies the rest.

III. Admits paragraph III.

IV. Admits that on October 30, 1972 plaintiffs "boarded" (some of them refused to show their boarding passes) codefendant's Flight 296, destination New York, and denies the rest.

V - XVI. Denies paragraphs V through XVI.

XVII. Admits that the grand jury returned "no true bill" (strictly on a jurisdictional technicality or upon the U.S. attorney's suggestion) and denies the rest.

XVIII - XX. Denies paragraphs XVIII through XX.

AFFIRMATIVE DEFENSES

A. Venue in this judicial district is improper; for the convenience of parties and witnesses and in the interest of justice, the action should be transferred.

B. Codefendant's liability, whose existence is denied, is limited by Passenger Rules Tariff No. RR-3 filed with the Civil Aeronautics Board, a document issued in compliance with law.

C. Plaintiffs could not have possibly suffered damages to their reputation since the latter, upon information and belief, is not too good, plaintiffs having arrest or conviction records in the City of New York for various offenses, among them but not necessarily limited to, petty or grand larceny, possession of marijuana, possession of heroin with intent to use, possession of stolen property, felonious assault, possession of dangerous drug, theft of service, disorderly conduct, impairing the morals of a minor, robbery, burglary, possession of a knife, loitering, possession of burglary tools or possession of hypodermic needle.

D. Codefendant is not liable to plaintiffs because according to F.A.A. regulations, the pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.

E. Plaintiffs have failed to state a claim upon which

relief can be granted.

F. The events referred to in the complaint were due solely and exclusively to plaintiffs' own negligence and particularly their obstreperous conduct.

WHEREFORE codefendant prays the Honorable Court to enter judgment dismissing the complaint, taxing costs and attorney's fees against plaintiffs.

In San Juan, Puerto Rico, on August 7, 1973.

Copy on this date by mail to Luis G. Estades, Esq., P. O. Box 1544, San Juan, Puerto Rico 00903.

McCONNELL VALDES KELLEY
SIFRE GRIGGS & RUIZ-SURIA
Counsel for Codefendant Pan
American World Airways
G.P.O. Box 4225
San Juan, Puerto Rico 00936

By:_____
Rafael Perez-Bachs

PETITION FOR REMOVAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

GILBERTO GERENA VALENTIN; JOSE ANTONIO APONTE VAZQUEZ; GEORGE B. FLORES RUIZ; CARLOS REYES LOPEX and JOSEPH MENDEZ RIVERA, Plaintiffs	/	Civil No. _____
V.	/	
PAN AMERICAN WORLD AIRWAYS and EDWIN H. GLASSER Defendants.	/	CIVIL ACTION

PETITION FOR REMOVAL

TO THE HONORABLE COURT:

Comes now codefendant Pan American World Airways, petitioner herein, through its undersigned attorneys and respectfully states and prays as follows:

1. On May 31, 1973, an action was commenced against petitioner before the Superior Court of Puerto Rico, San Juan Part, entitled as captioned above, docket no. 73-3609 (III). Copies of the summons and complaint were served on petitioner on June 8, 1973 and to date, upon information and belief, the local court has not acquired jurisdiction over codefendant Edwin H. Glasser.

2. Petitioner is a carrier as defined in the Federal Aviation Act of 1958, 49 U.S.C. 1301 et seq.

3. The action herein is a civil action and the matter in controversy exceeds the sum of $10,000, as appears from page 6 of the complaint.

4. The Honorable Court has original jurisdiction over this action under 28 U.S.C. 1331(a) and Section 404(b) of the Federal Aviation Act of 1958, 49 U.S.C. 1374(b) and thus it may be properly removed hereto under 28 U.S.C. 1441, since plaintiffs have alleged that petitioner, through its employee (codefendant) Mr. Glasser subjected them to unjust discrimination in air transportation or undue or unreasonable prejudice or disadvantage due to plaintiffs' race and ethnic background (par. IX of complaint), ejecting them from one of its interstate flights in violation of their civil rights (par. XII of complaint) and using state and federal police agents for said purpose, which events plaintiffs allege culminated in their arrest and temporary incarceration.

5. Petitioner files herewith a copy of all process and pleadings served upon it in this action together with a bond with good and sufficient surety conditioned, as required by 28 U.S.C. 1446(d), that it will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the action was not removable or was improperly removed.

WHEREFORE petitioner prays that the above-captioned action now pending against it before the Superior Court of Puerto Rico, San Juan Part, be removed therefrom to this Honorable Court.

In San Juan, Puerto Rico, on June 25, 1973.

McCONNELL VALDES KELLEY SIFRE
GRIGGS & RUIZ-SURIA
Counsel for Petitioner
G.P.O. Box 4225
San Juan, Puerto Rico 00936

By: _____
Rafael Perez-Bachs

VERIFICATION

RAFAEL PEREZ-BACHS, of legal age, attorney and resident of Guaynabo, Puerto Rico, states that he is one of the attorneys for defendant herein, that he has prepared and read the foregoing petition for removal and that the matters contained therein are true, as he verily believes.

_____
RAFAEL PEREZ-BACHS

Affidavit No. 1301

Sworn and subscribed before me by Rafael Perez-Bachs of the personal circumstances set forth above and personally known to me, in San Juan, Puerto Rico, on June 25, 1973.

_____
Notary Public

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- X

GILBERTO GERENA VALENTIN, et al., :

Plaintiffs, :

-against- : 73-C-1552

PAN AMERICAN WORLD AIRWAYS, INC., and EDWIN H. GLASER, :

Defendants. :

- X

United States Courthouse
Brooklyn, New York

December 16, 1974
10:30 o'clock a.m.

B e f o r e :

HON. WALTER J. BRUCHHAUSEN,

U.S.D.J.

BURTON SULZER
OFFICIAL COURT REPORTER

Appearances:

Messrs. HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendants
One State Street Plaza
New York, N.Y. 10004

By: WILLIAM J. JUNKERMAN, ESQ., of Counsel

* * *

MR. JUNKERMAN: The defendant is ready, your Honor.

THE COURT: I don't see the plaintiffs' attorney or any of his witnesses here, although this is a day that the case was scheduled peremptorily for trial.

You may proceed, Mr. Junkerman.

MR. JUNKERMAN: Your Honor, in view of the failure of the plaintiffs and plaintiffs' attorney to appear today for the trial of this action at the time and place scheduled by this Court, and in view of the failure of plaintiffs' attorney to appear at prior pre-trial conferences defendant Pan American World Airways, Inc., now moves this Court, pursuant to Rule 41 (b) of the Federal Rules of Civil Procedure and Rule 8 of this Court's Calendar Rules, to dismiss this action on the merits with prejudice and with costs, including reasonable attorneys' fees, to the defendant on the ground that plaintiffs and their attorney have failed to prosecute this action with due diligence and have failed to comply with the Order of this Court dated

December 9, 1974.

As this Court is aware, the history of the plaintiffs' prosecution of this action has been filed both with procrastination and with disregard of the attempts by the defendant and by this Court to complete the discovery process and proceed to a trial of plaintiffs' claims. We have set forth this history in detail in an affidavit being submitted in support of this motion.

THE CLERK: Affidavit of William J. Junkerman, sworn to the 16th day of December, 1974, marked in evidence as Defendant's Exhibit Number 1.

(So marked.)

MR. JUNKERMAN: For example, plaintiffs' attorney failed to appear at pre-trial conferences on March 4, April 17 and October 25, 1974. It should also be noted that all pre-trial discovery in this action has been instituted by defendant, the plaintiffs have done nothing since the commencement of this action except to oppose relief sought by defendant. In any event, at the pre-trial

conference on October 25, 1974, which was attended by a non-attorney representative of the office of the plaintiffs' attorney, this Court set this case down for trial on December 4, 1974, at 10:00 a.m. A memorandum to this effect, signed by your Honor and dated October 29, 1974, was sent directly to the plaintiffs' attorney. Thereafter, by a memorandum dated November 26, 1974, this Court advised the attorneys for the plaintiffs and for the defendants that, due to prior trial commitments, the trial date was re-scheduled to December 16, 1974. That memorandum stated, "It is expected that both sides will be prepared to proceed to trial on December 16, 1974." On December 2nd, plaintiffs' attorney personally accepted service of (and signed for) a copy of defendant's motion to require him to return deposition transcripts for use at the trial scheduled to commence on December 16th. Plaintiffs' attorney ignored the motion and failed to appear on the return date, which was December 9, 1974 at 10:00 a.m. Furthermore, an order of this Court dated December 9, 1974,

and served upon the plaintiffs' attorney's office by hand with notice of entry that same day, contains the following provision:

> "ORDERED, that in view of the prior notice issued by this Court with respect to the trial of this action, this Court peremptorily orders and decrees that the trial of this action will commence at 10:00 a.m. on December 16, 1974 before the Honorable Walter Bruchhausen in Courtroom No. 3, in the United States Courthouse, 225 Cadman Plaza, Borough of Brooklyn, County of Kings, City and State of New York."

There can be no question but that the plaintiffs' attorney has received from this Court's memoranda, from defendant's motion, and from the Court Order of December 9, 1974 clear and timely notice of the time and place that this action would be tried. Until the afternoon of Friday, December 13th, defendant's attorneys received no indication from the plaintiffs' attorney that he or his clients would be unable to proceed to trial on the

scheduled date, and defendant's attorneys understand that no such indication was given any earlier by the plaintiffs' attorney to this Court. Indeed, it is our understanding that, as of 2:00 p.m. on December 13th, your Honor had still not received plaintiffs' attorney's last-minute "Notice of Entry" (sic) requesting an adjournment. Consequently, the failure of the plaintiffs and their attorney to appear for the scheduled trial constitutes, as they must have known it would, a wilful abandonment of the prosecution of this action requiring dismissal of this action upon the merits pursuant to Fed. R. Civ. P. 41 (b) and Rule 8 of this Court's Calendar Rules. The strong legal basis for such a dismissal under these circumstances is described in a memorandum of law being submitted in support of this motion. And I respectfully submit the memorandum at this time, if your Honor please. I will offer it in evidence.

THE COURT: That will be marked in evidence.

THE CLERK: Memorandum of law received

in evidence as Defendant's Exhibit 2.

(So marked.)

MR. JUNKERMAN: It should be noted that the failure of the plaintiffs and the plaintiffs' attorney to appear for the trial of this action or to give timely notice that they would be unable to appear has clearly prejudiced the defendant, which is completely prepared to go forward with the trial of this action. Defendant's attorneys prepared for and set aside time for this trial in accordance with this Court's schedule, and, in view of defendant's attorneys' forthcoming trials in other actions, it is unlikely that defendant's attorneys will again have, in the near future, sufficient time to prepare again for the trial of this action. In addition, defendant's attorneys have arranged to have employees of the defendant flown to New York City from Puerto Rico and Hawaii in order that they can testify at this trial on behalf of defendant. These witnesses arrived in New York over the past weekend and are present in the courtroom awaiting their time to testify. Aside from the costs of transporting these witnesses

to New York and keeping them here, defendant has also incurred the cost of paying for replacement personnel or extra work by other personnel in the absence of these witnesses. Needless to say, other personnel cannot be expected to completely fill the gaps left by the absence of these witnesses from their usual work assignments, so there is a considerable intangible prejudice to the defendant that would arise from having to take these witnesses away from their work for the defendant on another occasion. Of course, there is also great prejudice to this Court's administration of pending cases.

Another ground for this motion is the failure of the plaintiffs' attorney to comply with that portion of this Court's Order of December 9, 1974, that ordered the plaintiffs' attorney to deliver the original transcripts of the plaintiffs' depositions to this Court no later than forty-eight hours after receipt of a copy of the Order. A copy of the Order, with notice of entry, was served by hand on plaintiffs' attorney on December 9, 1974, but

the deposition transcripts were not delivered as required. In fact, they have still not been delivered, either to this Court or to defendant's attorneys. Plaintiffs' attorney cannot claim that he was surprised by this Order, for, as indicated earlier, on December 2nd he personally accepted service of (and signed for) defendant's notice of motion for this Order. The excuse given by the plaintiffs' attorney for delaying return of the transcripts is completely improper, for he has only 30 days under Fed. R. Civ. P. 30 (e) to have them executed. Plaintiffs' attorney need not read these to the plaintiffs, and, in any event, he has had these deposition transcripts for five months already. Pursuant to Rule 30 (e) of the Federal Rules of Civil Procedure, defendant's attorneys obtained affidavits from the stenographic reporters involved that should, notwithstanding the plaintiffs' attorney's failure, permit the depositions to be used as fully as though signed, but defendant has still been prejudiced by this failure on the part of plaintiffs' attorney. First, by not returning executed deposition

transcripts, the plaintiffs and the plaintiffs' attorney have prevented defendant's attorneys from discovering whether or not plaintiffs have made any significant substantive changes in their testimony as it was transcribed by the stenographic reporters. Defendant had a right to take the depositions of the plaintiffs before the trial of this action, but this right has been significantly and improperly diminished by the failure of the plaintiffs and plaintiffs' attorney to execute their depositions (with or without changes) and return them within the 30 days permitted by Rule 30(e). Second, this failure may also prejudice the defendant in that defendant may be exposed to arguments by the plaintiffs that the stenographic reporters' affidavits are somehow insufficient or otherwise unsatisfactory as a basis for using the unexecuted deposition copies as fully as though they were executed originals of the deposition transcripts. Therefore, in view of the clear violation of this Court's Order of December 9, 1974, and the prejudice to the defendant resulting therefrom, this action should be dismissed with prejudice

on the merits pursuant to Fed. R. Civ. P. 41 (b) and Rule 8 of this Court's Calendar Rules.

Finally, pursuant to these same rules, defendant respectfully requests this Court to award it, in addition to dismissing this action, the costs of preparing this action for trial, including reasonable attorneys' fees. Defendant has already spent thousands of dollars on travel, hotels, etc., for the employees who were brought to New York City to testify at the scheduled trial. In addition, defendant's attorneys have expended substantial time over the last two months on direct preparation for the scheduled trial, and this expenditure of time has been accompanied by numerous disbursements and other costs also related directly to the preparation for the scheduled trial, and defendant's attorneys are prepared to submit an affidavit, accompanied by appropriate exhibits, setting forth in detail the nature and extent of all of the costs incurred by the defendant in preparation for the scheduled trial for which it seeks reimbursement from the

plaintiffs.

In the alternative, even if this Court does not dismiss plaintiffs' action for failure to prosecute or for failure to comply with this Court's Order of December 9, 1974, it is respectfully requested that this Court award to the defendant the costs incurred by the defendant as a result of the failure of the plaintiffs and plaintiffs' attorney to appear for the trial of this action and to otherwise prosecute this case in accordance with this Court's orders and directions.

Wherefor , defendant requests that, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure and Rule 8 of this Court's Calendar Rules, the plaintiffs' action be dismissed with prejudice on the merits for failure to prosecute and for failure to comply with this Court's Order of December 9, 1974, and that defendant be awarded the costs, including reasonable attorneys' fees, of preparing for the scheduled trial of this action.

If your Honor please, I would at this moment also like to offer in evidence the bills

that were paid for the transcript of the depositions in this case.

The first one is dated April - -

THE COURT: What is that document?

MR. JUNKERMAN: These are the bills from the Court Reporter and copies of our canceled checks in payment thereof.

THE COURT: Very well. Let it be marked in evidence.

MR. JUNKERMAN: I offer this bill of April 16, 1974 in the sum of $75.00, to which is attached a Xerox copy of the check with which we paid the bill. I would offer that in evidence.

THE CLERK: Court Reporter bill, together with canceled check, received in evidence as Defendant's Exhibit 3.

(So marked.)

MR. JUNKERMAN: I will also offer in evidence the bill of the Esquire Reporting Company dated May 8, 1974 in the sum of $160.75, and to which there is attached our canceled checks in the sum of $160.75 in payment that bill.

THE CLERK: Bill of Esquire Reporting Company, Inc., dated May 8, 1974, together with canceled check of Haight, Gardner, Poor & Havens received in evidence as Defendant Exhibit Number 4.

(So marked.)

MR. JUNKERMAN: I also offer in evidence a bill of Esquire Reporting Service, dated July 8, 1974 in the sum of $70.75, to which there is attached a Xerox copy of our canceled checks in payment of that bill.

THE CLERK: Bill of Esquire Reporting Company, Inc., together with canceled checks of Haight, Gardner, Poor & Havens, received in evidence as Defendant's Exhibit 5.

(So marked.)

MR. JUNKERMAN: Now, if your Honor please, I would like to take brief testimony of two of the witnesses, one who came from Honolulu and the other from San Juan, in support of our motion to dismiss.

THE COURT: Very well.

MR. JUNKERMAN: The first witness I will call is Stewardess Mieko Arimoto.

M I E K O A R I M O T O , called as a witness, having been first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. JUNKERMAN:

Q Mrs. Arimoto, are you an American citizen?

A No, I am a Japanese citizen.

Q What is your employment?

A I am employed with Pan Am World Airways.

Q Where do you reside?

A I live in Honolulu.

Q How long have you been employed by Pan American World Airways?

A I started with Pan American in December 22nd, 1968, which is almost six years ago.

Q You are a stewardess, are you not?

A Yes, I am.

Q On what routes are you presently flying for Pan American, as a stewardess?

A Right now, out of Honolulu I fly the Pacific routes, which is mostly to the Orient.

Q And for how long have you been flying that route?

A About two years before I left New York.

Q On October 30, 1972, were you a stewardess on a plane that was scheduled to leave San Juan for New York?

A Yes. We were on a turn-around from New York to San Juan and supposed to depart at 11:30 from San Juan.

Q Was that Flight No. 296?

A Yes, it was.

Q And when did you board that plane?

A Usually we board about an hour before departure, which makes it about 10:30.

Q And were you aboard that plane when the five plaintiffs in this action boarded the plane?

A Yes, I was.

Q Did they create a disturbance on the plane?

A The two Puerto Rican passengers did, yes.

Q And which ones were those?

A The two men - - they started all the problems, as far as I could see; they were disturbing other passengers besides the crew members.

Q And did the other three plaintiffs then go up and join them?

A Not to my recollection. I can't remember. I only remember the captain and the traffic agent talking to the two Puerto Rican boys.

Q I see. At any rate, could you describe this disturbance, was it a great disturbance?

A For me it was, I think.

Q Did they use loud boisterous language?

A They used foul language. It was unnecessary. They were disturbing other passengers around them. They were not talking in a normal voice, they were talking louder than a normal voice.

THE COURT: This occurred in Puerto Rico, didn't it?

THE WITNESS: Yes, at the airport.

Q Subsequently, did the police come and take them off the plane?

A No. The policemen did come on board, but they just seemed to walk up and down the airplane. We didn't know what was happening, we thought, well, maybe they didn't have the authority to arrest these men, because they gave them a choice of getting off the airplane or else being arrested, and that's when the FBI came.

Q At any rate, the police did the arresting of these people, the police took them off, did they not?

A Yes, I believe they did.

Q Now, did you come here prepared to testify in defense of the claims that the plaintiffs have brought

in this action?

A Yes.

Q And when did you leave Honolulu?

A I left Friday late afternoon.

Q When did you arrive in New York?

A Saturday morning.

Q When was the first time that you ever saw me?

A Sunday afternoon.

Q Did you then come to my office yesterday, Sunday afternoon?

A Yes, I did.

Q And that was the first time we saw each other or talked to each other, is that right?

A Yes.

Q Now, are you staying at a hotel in New York?

A Yes, at the Brookshire.

Q Did you stay there Saturday night?

A Yes, sir.

Q Did you stay there Sunday night?

A Yes, sir.

Q And are you going to have to stay there tonight?

A Yes.

Q When you flew from Honolulu to New York did

you fly on a Pan American plane?

A No, we flew United because Pan Am doesn't fly domestically.

Q Pan Am doesn't fly from Puerto Rico directly to New York?

A No.

Q What is the price of that round trip ticket?

A I believe the fare is $518.00 round trip.

Q How much?

A $518.00 round trip.

Q Is that a coach ticket?

A Yes, it is.

Q Do you know what the room rate of your hotel is?

A I believe it is approximately about 30 to 35 or so.

Q $35.00 a day?

A Yes.

Q Did you use taxis coming to my office and going home?

A Yes. Since I am not familiar with New York at all, I've been taking taxis, yes.

Q And approximately how much have your taxi bills been?

A Just so far it's been $25.00, I'd say.

Q I assume that you are going to have to take a taxi back to your hotel?

A Yes.

Q And will you have to take a taxi then out to the airport when you leave?

A Yes.

Q That would amount to approximately how much more, would you say?

A Well, depending how long I'm here, but probably approximately about $50.00, I'd say.

Q A total of $50.00?

A Yes.

MR. JUNKERMAN: No further questions.

THE COURT: You may step down.

(Witness excused.)

MR. JUNKERMAN: Mr. Kervin, will you please take the stand?

J A M E S R . K E R V I N , called as a witness, having been first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

BY MR. JUNKERMAN:

Q Where do you reside, Mr. Kervin?

A At present I reside in the City of Kingston, Jamaica.

Q By whom are you employed?

A I am employed by Pan American Airways.

Q For how long a period of time have you been employed by Pan American Airways?

A Twenty-nine years.

Q In October, 1972 what was your position with Pan Am and where were you stationed?

A I was stationed in San Juan, Puerto Rico. My title was Director of Passenger Services.

Q As Director of Passenger Services were you in charge of administrative matters at San Juan?

A Yes, sir, San Juan East Liberty Airport, yes, sir.

Q That is on October 30, 1972?

A Right.

Q Will you tell the Court where you were at the time Flight 296 was scheduled to depart and what you did that evening?

A Flight 296 was scheduled to depart San Juan at 11:30 in the evening. I was home and in bed at that time.

Q Did you receive a telephone call?

A I received a telephone call at about 12:30.

Q What was the nature of the call?

A It was a call from my duty supervisor advising me

that there was a problem in the departure of Flight 296. There appeared to be a disturbance on board and he suggested - - he asked me for advice and I said I would come to the airport, which I did immediately.

Q When you got to the airport what was the condition that you found in respect to the flight?

A Upon arrival at the airport I immediately consulted with our duty supervisor, discovered that Flight 296 had initially been boarded for departure; subsequent to that boarding a disturbance had broken out on the airplane which required the intervention of the police and the FBI.

By the time I arrived at the airport not only were police there but FBI representatives were on the scene. The aircraft had been evacuated of passengers with the exception of five individuals who I was told had caused the disturbance.

Q Are they the five plaintiffs in this action?

A Yes, sir.

Q Then what did you observe the police do?

A As I say, at the time of my arrival it was sort of a truce which apparently had been declared; the five individuals were back in the middle part of the cabin. I had been consulting with the captain. In addition, there were FBI representatives and police available.

There was initially - - perhaps initial questions of jurisdiction, what procedure should be used. At the time of my arrival the highest police officer on duty was a sergeant. He felt he did not have enough authority to proceed any further without consultation. He subsequently called in a higher official who was a major. The Major, the FBI and I, with the Captain, again consulted, and at that point the decision was made by the police to proceed with an arrest.

Q Were they the Puerto Rican police?

A Yes, sir.

Q Did they arrest the five of them?

A Yes,sir.

Q Where were they taken, do you know?

A At the San Juan International Airport there is a police sub-station. They were taken to that sub-station and, I guess you might say, booked.

Q At any rate, did you go to the courthouse where they were taken later?

A The initial courthouse, yes, sir.

It was suggested by both police representatives and the FBI that Pan Am responsible reps accompany them and at least stand by for whatever future action might take place.

Q Were you present when the court made a

certain decision?

A Are you referring now to the action that the police or the subsequent - -

Q I am talking about when they were in the courthouse.

A The night court?

Q The night court.

A Yes, sir, I was present at night court.

Q What did the night court judge do?

A We - -

Q Did he dismiss it for lack of jurisdiction?

A The night court judge dismissed the complaint or the action that had been submitted due to lack of jurisdiction.

Q Lack of his jurisdiction?

A Yes, sir.

Q What happened after that?

A We proceeded out of night court and the defendants were then arrested by the FBI.

Q Were they - -

A In their position as a federal officer.

Q Were they then taken to this Federal Court?

A Yes, sir.

Q Did you or any other Pan American representative

or employee accompany the police after you left the local night court?

A No, sir.

Q So whatever happened after that was done by the police, is that right, the FBI?

A Yes, sir.

Q Incidentally, what is your position now?

A I am the Director for Jamaica for Pan Am.

Q In coming up here to testify did you have to have a replacement take your place?

A Yes, sir.

Q And in connection with the flight, did you fly Pan American here?

A I flew a Pan American airplane up here, yes.

Q Did you fly as a passenger or a member of the crew?

A As a passenger.

Q Do you know what the normal fare is for round trip from Jamaica to New York?

A Round trip fare, Kingston to New York and back, is $369.00 at the present time.

Q Are you staying at a hotel in New York?

A Yes, sir.

Q What hotel is it?

A The Berkshire Hotel.

Q When did you arrive?

A I arrived last evening.

Q When did you first meet me?

A 4:30 yesterday afternoon, sir.

Q In my office?

A Yes, sir.

Q That is the first time we ever met each other, is that right?

A That is correct.

Q Have you been spending money on taxis since you got here?

A Yes, sir.

Q Approximately how much?

A From the airport to your office, from your office to the hotel, and then a taxi back to your office this morning, because, again, I'm not familiar with New York City. I would say close to $30.00.

Q And how much additional taxi expense do you anticipate having before you leave here, assuming that the case is concluded?

A I would say a minimum of $25.00 more.

Q With respect to meals, can you tell us approximately what you have been spending per day?

A I would say meal expense per day would be at least $15.00.

MR. JUNKERMAN: Nothing further.

THE COURT: You may step down.

(Witness excused.)

MR. JUNKERMAN: Now, if your Honor please, I would like to say that Captain Edwin H. Glaser, the captain of Flight 296 on October 30 is completely prepared to testify here and he had plans to be here this afternoon. He landed his plane on an international flight at John F. Kennedy Airport at 4:00 o'clock this morning. I told him when he spoke to me earlier in the week that he should try to get a six-hour rest and I would call him. He lives on Eastern Long Island, and he is prepared to come in here and testify. He would give the same kind or similar testimony as that of the other two witnesses, but I don't know whether it is necessary to do so or not.

THE COURT: I would not think it would be needed.

MR. JUNKERMAN: If that be the case,

your Honor, then I have no further evidence or testimony to submit in support of the motion.

THE COURT: I grant your motion in full, and also the fees and disbursements.

You may then proceed to prepare an appropriate decree in the matter.

MR. JUNKERMAN: I will prepare findings of fact and conclusions of law.

THE COURT: Yes. Then I will ask the Reporter to submit to the Court an original and a copy of the transcript of these proceedings.

Very well, gentlemen.

(Time noted: 11:00 o'clock a.m.)

* * *

E X H I B I T S

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JUDGMENT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

* *X

GILBERTO GERENA VALENTIN,
JOSE ANTONIO APONTE VAZQUEZ,
JORGE B. FLORES-RUIZ,
CARLOS REYES LOPEZ and
JOSEPH MENDEZ RIVERA,

Plaintiffs,

-against-

PAN AMERICAN WORLD AIRWAYS, and
EDWIN H. GLASER,

Defendants.

* *X

JUDGMENT

73 C 1552

The issues in the above-entitled action joined by the complaint of the plaintiffs and the answer of the defendant, having been regularly brought on for trial before HON. WALTER BRUCHHAUSEN, Senior United States District Judge of this Court, held on the 16th day of December, 1974 at the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, and the defendant Pan American World Airways, Inc. having appeared by Haight, Gardner, Poor & Havens, Esqs., its attorneys (William J. Junkerman, Esq., of Counsel), and said defendant having moved, pursuant to Rule 41(b) of Rules of Civil Procedure and Rule 8 of this Court's Calendar Rules to dismiss this action on the merits with prejudice and with costs, including reasonable attorneys fees, upon the ground that plaintiffs and their

attorney have failed to prosecute this action with due diligence and have failed to comply with the order of this court dated December 9, 1974 peremptorily ordering and directing the case to be tried on December 16, 1974 and the Court having heard the allegations and proofs of the defendant Pan American World Airways, Inc., and after due deliberation, and having made and filed its decision on the 19th day of December, 1974 concerning a statement of the facts found and conclusions of law thereon and directing judgment as hereinafter stated;

NOW, ON MOTION of Haight, Gardner, Poor & Havens, Esqs., attorneys for the defendant Pan American World Airways, Inc.; it is

ORDERED, ADJUDGED AND DECREED that the complaint of the plaintiffs herein be and the same hereby is dismissed upon the merits; and it is further

ORDERED, ADJUDGED AND DECREED that the defendant Pan American World Airways, Inc. recover of the plaintiffs Gilberto Gerena Valentin, 36 Riverside Drive, New York City, N. Y. 10023, Jose Antonio Apont Vazquez, 1230 Sheridan Avenue, Bronx, N. Y., Jorge B. Flores-Ruiz, 989 Grant Avenue, Bronx, N. Y. 10456, Carlos Reyes, 304 East 162nd Street, Bronx, N. Y., and Joseph Mendez Rivera, 932 Hoe Avenue, Bronx, N. Y., the sum of $2,291.25 as its taxable costs and disbursements of this action and the sum of $12,000.00 as its reasonable counsel fees, amounting in all to the sum of $14,291.25, and that defendant

Airways, Inc., do not constitute malicious prosecution of the

Pan American World Airways, Inc. have execution therefor against the said plaintiffs.

Dated: Brooklyn, N. Y.
December 19, 1974

Walter Bruchhausen
Senior U.S.D.J.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

GILBERTO GERENA VALENTIN, JOSE ANTONIO APONTE VAZQUEZ, JORGE B. FLORES-RUIZ, CARLOS REYES LOPEZ and JOSEPH MENDEZ RIVERA, Plaintiffs, -against- PAN AMERICAN WORLD AIRWAYS, and EDWIN H. GLASER, Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW 73 C 1552

The issues herein coming on to be tried by the Court at a Term thereof held by the Undersigned on the 16th day of December, 1974; the plaintiffs and their attorney having failed to appear; and defendant Pan American World Airways, Inc., having appeared by Haight, Gardner, Poor & Havens, its attorneys, William J. Junkerman, Esq., of counsel; and said defendant having moved pursuant to Rule 41(b) of the Federal Rules of Civil Procedure and Rule 8 of this Court's Calendar Rules to dismiss this action on the merits with prejudice and with costs, including reasonable attorneys' fees to the defendant, on the ground that plaintiffs and their attorney have failed to prosecute this action with due diligence and have failed to comply with the Order of this Court dated December 9,

1974; and evidence, including exhibits and testimony, having been presented and considered; I do hereby decide and find as follows:

FINDINGS OF FACT

1. At the taking of the plaintiffs' depositions on February 20 and 22, 1974, plaintiffs' attorney consistently interrupted defendant's attorney's examination of the five plaintiffs and directed them not to answer proper questions relating to the allegations contained in the complaint. Defendant's attorney was thereupon required to keep the depositions of four of the plaintiffs open and to make an application before this Court for an order compelling these plaintiffs to return for the completion of their depositions and for an order directing them to respond to the questions which their attorney had not permitted them to answer on February 20 and 22. This application was made returnable on March 4, 1974, the same date upon which this Court had scheduled a pre-trial conference in this case. On March 4, 1974, neither the plaintiffs' attorney nor any representative from his office appeared at that pre-trial conference.

2. At this Court's direction, defendant's attorney wrote to plaintiffs attorney on March 4, 1974, instructing him that his default had been duly noted and that Pan American's application would be ruled upon on Monday, March 11th, without oral argument. Thereafter, by Memorandum

and Order dated March 14, 1974, this Court overruled all of the objections interposed by plaintiffs' attorney during the depositions and directed plaintiffs' attorney to produce his clients for their continued depositions. Defendant's attorneys then served notices for these continued depositions, and they were recommenced on April 11, 1974, at the office of defendant's attorneys. However, plaintiffs' attorney again continued the obstructive conduct he had demonstrated when these depositions were originally commenced in February of 1974, rendering it necessary for defendant's attorney to stop the depositions and to arrange for further rulings on the same morning by this Court.

3. After this Court once again overruled plaintiffs' attorney's objections the depositions were continued on the afternoon of April 11, 1974, in the United States Courthouse, but plaintiffs' attorney again continued to interrupt defendant's attorneys examination of the plaintiffs. Thereafter, at this Court's direction, three of the depositions were completed in this Court's presence during the course of which all objections propounded by plaintiffs' attorney were overruled. In this manner, the three depositions were completed. However, plaintiff Joseph Mendez Rivera failed to appear in this Court on the afternoon of April 11th, and, consequently, at the end of the proceedings plaintiffs' attorney promised to produce him for the continuance of his deposition

at defendant's attorneys office on the afternoon of April 15, 1974. Defendant's attorneys then instructed the court reporter to be at his office at 3:00 p.m. on that date for the continued examination of this plaintiff.

4. The court reporter arrived at defendant's attorneys office on that date, but neither the plaintiffs' attorney nor the plaintiff appeared. The default of the appearance of the plaintiff Joseph Mendez Rivera and his attorney were duly noted at 4:00 p.m.

5. A pre-trial conference had been scheduled by this Court in this action for 10:00 a.m. on April 17, 1974, and at that time defendant's attorney discussed this default of plaintiff Joseph Mendez Rivera. However, for the second straight time, neither the plaintiffs' attorney nor any representative from his office appeared at that scheduled pre-trial conference. Consequently, pursuant to the instructions of this Court, defendant's attorneys prepared and served a notice of motion to dismiss the complaint of plaintiff Joseph Mendez Rivera that was made returnable on April 29, 1974.

6. By order of this Court dated June 3, 1974, plaintiff Joseph Mendez Rivera was directed to appear in the United States District Court for the Eastern District of New York for the completion of his deposition on June 13, 1974.

7. On May 30, 1974, defendant's attorneys had hand-delivered to the office of plaintiffs' attorney the

original and one extra copy of the transcripts of the depositions of plaintiffs Gilberto Gerena Valentin, Jose Antonio Aponte Vasquez, Jorge B. Flores-Ruiz and Carlos Reyes, In the letters accompanying the hand-delivered transcripts, it was requested that each plaintiff sign and swear to the original of his deposition and that it be returned to defendant's attorneys as soon as possible.

8. On June 13, 1974, in response to the order of this Court, the deposition of plaintiff Joseph Mendez Rivera was completed. During the proceedings before this Court with relation to that deposition, plaintiffs' attorney indicated to defendant's attorneys and to this Court that the depositions of the other four plaintiffs would be executed and returned to defendant's attorneys within a week or two thereafter.

9. On July 9, 1974, having received none of the deposition transcripts from the plaintiffs' attorney, defendant's attorneys again wrote to the plaintiffs' attorney requesting the return of the original transcripts of the depositions delivered to him on May 30th. In that letter it was emphasized that plaintiffs' attorney had given his assurances on June 13, 1974, to both defendant's attorneys and to this Court that he would forward the executed transcripts to the attorneys for defendant Pan American within a week or two thereafter, and it was also emphasized that these transcripts

would be required by defendant in time for the pre-trial conference scheduled in this case for October 18, 1974.

10. On July 9, 1974, defendant's attorneys also delivered to plaintiffs' attorney the original and one copy of the transcript of the deposition of plaintiff Joseph Mendez Rivera taken on February 22, 1974, and the original and one copy of the transcript of his deposition taken before this Court on June 13, 1974.

11. On October 7, 1974, defendant's attorneys arranged to postpone the pre-trial conference scheduled in this matter from October 18, 1974 to October 25, 1974, because of a schedule conflict. The attorney for the plaintiffs was duly notified by letter of this change. On October 25, 1974, defendant's attorneys appeared in this Court for this pre-trial conference, but plaintiffs' attorney for the third straight time failed to appear for a scheduled pre-trial conference. Instead, a representative who was not an attorney appeared from plaintiffs' attorney's office and stated that the plaintiffs' attorney had a prior commitment on that date. At that conference, this Court set this case down for trial on December 4, 1974. The plaintiffs' attorney was further informed of this trial by a letter from this Court dated October 29, 1974, and this court admonished plaintiffs' attorney for his failure to give any prior notice of his intention not to appear for the pre-trial conference scheduled for October 25th.

12. By November 19, 1974, defendant's attorneys still had not received from the plaintiffs' attorney any of the original transcripts of the depositions of the five plaintiffs, nor had defendant's attorneys received any communication from plaintiffs attorney concerning the inordinate delay in returning the deposition transcripts. On that date, defendant's attorneys wrote to plaintiffs' attorney asking him to return all of the original transcripts, even if unsigned, so that they could be presented to this Court at the trial of this action in the form signed and certified to by the court reporters in accordance with Rule 30(e) of the Federal Rules of Civil Procedure.

13. After this Court had set this case down for trial on December 4, 1974, defendant's attorney made preparations with his client for the production on that date of the witnesses who would testify at the trial. These witnesses included a stewardess who is based in Honolulu, a station manager based in Kingston, Jamaica, and the captain of the aircraft involved in the incident alleged in the complaint.

14. On November 22, 1974, defendant's attorney conferred with this Court and was advised that it was not possible for the trial to proceed on December 4, 1974, but that there appeared to be no conflict in this Court's schedule for December 16, 1974. Consequently, on that date, defendant's attorneys advised this Court by letter that the date of Decem-

ber 16, 1974, was acceptable from the standpoint of Pan American, and in that letter defendant's attorneys emphasized the great difficulty that Pan American would have in rearranging the work schedules of its employees who would appear as witnesses, if the trial of this action might be rescheduled through any last minute request of plaintiffs' attorney. A copy of this letter was sent to plaintiffs' attorney. Thereafter, on November 26, 1974, this Court mailed memorandum notices to the attorneys for both sides advising that the trial of this action had been rescheduled from December 4, 1974 to December 16, 1974, and stating: "It is expected that both sides will be prepared to proceed to trial on December 16, 1974."

15. This Court having firmly declared that the trial of this action would proceed on December 16, 1974, defendant's attorneys proceeded with final preparations for trial. However, the original transcripts of the depositions of the plaintiffs had still not been returned to defendant's attorneys, despite their letter to plaintiffs' attorney dated and hand-delivered on November 19, 1974. Defendant's attorneys then brought on a motion before this Court to compel the plaintiffs' attorney to return the transcripts of the depositions of the plaintiffs to defendant's attorneys forthwith. This motion was served on plaintiffs' attorney on December 2, 1974, and was made returnable on December 9, 1974. Copies of these motion papers were <u>personally</u> served upon the plaintiffs' attorney,

and he acknowledged receipt thereof with an admission of service in his own handwriting on the original and on defendant's attorneys' office copy of the motion papers.

16. On December 9, 1974, defendant's attorneys duly appeared before this Court to argue this motion. However, plaintiffs' attorney did not appear in court to oppose that motion. After waiting for approximately three-quarters of an hour and noting the default by plaintiffs, the motion was argued by defendant's attorney before this Court without opposition, and, at this Court's direction, an order was prepared directing plaintiffs' attorney to deliver the transcripts to this Court no later than forty-eight (48) hours after receipt of a copy of the Order, and decreeing that the case was peremptorily set down for trial at 10:00 a.m. on December 16, 1974. This order was signed by this Court on the afternoon of Monday, December 9, 1974 and a copy of the order with notice of entry was served upon plaintiffs' attorney at his office at 4:06 p.m. that day. However, the transcripts were not delivered to this Court (nor to defendant's attorneys) within the time period set forth in that order, nor were they delivered at any time prior to the scheduled trial on December 16, 1974.

17. In an affidavit filed on December 16th, the scheduled trial date, plaintiffs' attorney contended that he had been unable to have his clients execute the transcripts of

their depositions because of his difficulty in locating his clients and his need to go over these depositions with them in detail. However, it is incorrect for him to suggest that he has had no opportunity to discuss these depositions with his clients, since the last transcript thereof was delivered to him more than five months ago. Furthermore, even if he was having difficulty with his clients in relation to these depositions, that is no excuse for his failure to so advise this Court and his adversary. Plaintiffs' attorney not only ignored the requests of defendant's attorneys that he return these transcripts but he also ignored a notice of motion to compel him to return these depositions, a copy of which he personally admitted receiving. Therefore, plaintiffs' attorney had absolutely no excuse for his failure to return the transcripts of the depositions of his clients as ordered by this Court.

18. Plaintiffs' attorney had been on notice for over one and one-half months that this case was scheduled for trial on December 4, 1974 and more than two weeks notice that the trial date had been rescheduled to commence on December 16, 1974 but he completely failed to communicate to this Court or to defendant's attorneys any problem that he may have had with the scheduled trial dates. Approximately three hours before the close of the last working day before the peremptorily ordered trial date, he served a "notice of entry" (sic) on defendant's attorneys indicating a desire for an adjournment

because he was then engaged in a trial in the Civil Court in Queens County (an inferior court whose jurisdictional limit is $10,000.)

19. The plaintiffs' attorney had received, from this Court's memoranda, from defendant's motion, and from the Court Order of December 9, 1974, clear and timely notice of the time and place that this action would be tried. Nevertheless, neither the plaintiffs nor any attorney appeared for them when the trial of this action was called as scheduled at 10:00 a.m. on December 16, 1974. The excuses set forth in the affidavit of plaintiffs' attorney dated December 14, 1974, which was received after the trial, are insufficient and unacceptable under the circumstances.

20. The failure of the plaintiffs and the plaintiffs' attorney to appear for the trial of this action or to give timely notice that they would be unable to appear has prejudiced the defendant and their attorneys who were completely prepared to go forward with the trial of this action.

21. Employees of defendant were flown to New York City from Kingston, Jamaica and from Honolulu, Hawaii to testify at this trial on behalf of defendant. These witnesses testified briefly concerning the incident upon which this lawsuit is based and concerning the costs of their transportation and other legitimate expenses of Pan American as a result of their attendance as witnesses at the trial.

22. Defendant Pan American World Airways, Inc. is entitled to its taxable costs in this action amounting to $1,200. for the expense of the two witnesses coming to the trial from their homes in Kingston, Jamaica, and Honolulu, Hawaii, and said defendant is also entitled to the cost of the transcripts of the depositions for which its attorneys have paid the sum of $1,091.25, making a total of $2,291.25 for these allowable disbursements and defendant is also entitled to the reasonable counsel fees of its attorneys covering the period between October 25, 1974, when this case was first set down for trial, through December 16, 1974, the scheduled date of trial, in the sum of $12,000. amounting in all to the sum of $14,291.25.

23. In accordance with the testimony of the Pan American witnesses, I further find that on October 30, 1972, Pan American's Flight 296 was scheduled to depart Puerto Rico International Airport at San Juan for New York at 11:30 p.m.

24. Before the scheduled time for departure, a disturbance was created by the plaintiffs on board the aircraft, as a result of which Pan American requested that these plaintiffs leave the aircraft. The plaintiffs refused to do so.

25. The San Juan police were notified, and, after a lengthy delay, the plaintiffs were arrested by the Puerto Rican police and taken to a near-by police station and, from there, to the San Juan Local Night Court. At the request

of the police and the FBI, Pan American representatives attended that hearing. The Judge in that Court ordered the plaintiffs released because of his lack of jurisdiction over the subject matter of the complaint.

26. Upon leaving this local court, the plaintiffs were arrested by the FBI agents who had accompanied them from the aircraft, and they were taken to the United States District Court for the District of Puerto Rico for arraignment and subsequent criminal proceedings. This arrest was not made at the request of Pan American, nor did Pan American representatives participate in the federal criminal proceedings brought against the plaintiffs by the FBI agents.

CONCLUSIONS OF LAW

I. The failure of the plaintiffs and their attorney, to appear for the scheduled trial of this action on December 16, 1974 constitute wilful abandonment of the prosecution of this action and wilful failure to comply with the Orders of this Court within the meaning of Rule 41(b) of the Federal Rules of Civil Procedure and Rule 8 of this Court's Calendar Rules.

II. Defendant Pan American World Airways, Inc., acted properly and justifiably in having the plaintiffs removed from the aircraft.

III. The acts of defendant Pan American World

court during the course of a trial even if the court be a

Airways, Inc., do not constitute malicious prosecution of the plaintiffs.

IV. Defendant Pan American World Airways, Inc., is entitled to judgment dismissing this action on the merits with prejudice and with costs, including its reasonable attorneys' fees from October 25, 1974 through December 16, 1974 amounting to $14,291.25.

I direct that judgment be entered accordingly.

Dated: Brooklyn, N. Y.
December 19, 1974

Walter Bruchhausen
Senior U.S.D.J.

NOTICE OF MOTION

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

GILBERTO GERENA VALENTIN, et al, Plaintiffs, -against- PAN AMERICAN WORLD AIRWAYS, INC., EDWIN GLASSER Defendants.	73 C 1552 WB NOTICE OF MOTION

TO: HAIGHT, GARDNER, POOR & HAVENS, Esqs.
ATTORNEYS FOR DEFENDANTS

PLEASE TAKE NOTICE that upon the annexed affidavits of the plaintiffs, GILBERTO GERENA VALENTIN, JOSE ANTONIO APONTE VAZQUEZ, JORGE B. FLORES RUIZ, CARLOS REYES LOPEZ, and JOSEPH MENDEZ RIVERA, all sworn to the 14th day of November, 1975, and the affidavits of the HON. GEORGE W. MILLER, BERTHA DE FAZIO, and LORENZO F. PADILLA, all sworn to the 5th day of December, 1975, and upon the annexed exhibits, and upon all the records and proceedings had in this action, the undersigned will move before the HON. WALTER BRUCHHAUSEN, United States Senoir District Court Judge, at his chambers in the UNITED STATES COURTHOUSE, located at 225 Cadman Plaza East, County of Kings, City and State of New York, for the Eastern District of New York, on the 19th day of December, 1975, at 10:00 o'clock in the forenoon of said date or as soon thereafter as counsel can be heard, pursuant to Rule 60, et. seq., to set aside the judgment, find-

ings of fact and conclusions of law entered herein on or about the 19th day of December, 1974, on the grounds that the plaintiffs have a good and meritorious cause of action and the failure to appear at the scheduled trial hereof is excuseable, and the attorneys for the defendants perpetrated extrinsic and intrinsic fraud upon the Court and the plaintiffs cannot proceed in the action except with the use of a bilingual attorney, and the undersigned will further move this Court for the restoration of this cause to the Calendar in the greater interests of justice, together with all other and further relief as the Court may deem just and proper in the premises.

PLEASE TAKE FURTHER NOTICE, that opposing papers, if any must be served upon the undersigned on or before, December 17, 1975, at the offices and Post Office address stated below.

DATED: December 9, 1975

New York, New York

LORENZO F. PADILLA, Esq.
Attorney for Plaintiffs
Offices and Post Office Address
277 Broadway
New York City, New York 10007
212 227 3410

TO: HAIGHT, GARDNER, POOR & HAVENS, Esqs.
Attorneys for Defendants
Offices and Post Office Address
1 State Street Plaza
New York City, New York, 10004
212 344 6800

AFFIDAVIT OF GEORGE MILLER IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- -X

GILBERTO GERENA VALENTIN, et al

Plaintiffs,

-against-

PAN AMERICAN WORLD AIRWAYS, INC.,
and EDWIN GLASSER,

Defendants.

- -X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GEORGE W. MILLER, being duly sworn, deposes and says:

1. This deponent is the elected assemblyman of the 71st District New York State. This deponent is the selected chairman, of the standing committee on social services, New York State Assembly.

2. Upon being selected as the chairman of the standing committe on social services, New York State Assembly, I began search for a counsel to the committee with many significant qualifications.

3. Before describing the significant qualifications required of a counsel to the committee on social services, I deemed it to be important to inform this Court of the monies and the laws involved in the work of the said committee on social services.

4. The committee of social services, deals with 4½ billions of dollars in the State of New York. Of the said 4½ billion dollars, 2¼ billion dollars are Federal funds to be regulated and dispensed through the legislation of the committee, in conjunction with the Federal Laws.

5. This court may judicially notice the various Federal Laws, codes, and regulations involved in social services legislation. The laws of course involve the Health, Education and Welfare Department statutes and regulations dealing with the aged, the permanently disabled, the sick, widows, widowers, illegitimate children, unwed mothers, abscounding putative fathers, nursing homes, voluntary hospitals, daycare centers, medicaid and medicare together with attendant problem of quality control production, overpayments, illegal payments, inelligible payments, and; joined with the economic crisis of the nation, the state, and the city. The immensity of the committee's work should thus be evident. Likewise, the work for counsel for the committee is equally immense.

6. Add to all of the above, the need for understanding compasion, knowledge of the economics involved and the need to address the more than one million Spanish speaking people in the State. This court must now understand that to select and acquire a counsel for the committee was no easy task to this chairman.

7. However, because of many years of personal rela-

tionship in the poor communities in the City of New York, with Lorenzo F. Padilla, ESQ., I was fortunately able to ask and secure his services to the committee, without the motive of remuneration. The pay the committee could allow for the services of counsel, was only $10,000 per annum.

8. The committee as a standing committee, is subject to meet throughout the entire year throughout the entire State. This means that counsel for the committee is required to travel throughout the State for various functions, public hearings on the commission to revise the social services law for the State of New York.

From all that has been said herein, it must be obvious to this Court, that counsel for the plaintiffs herein, LORENZO F. PADILLA, ESQ., has rendered his services to the three governments, the Federal, The State and the City, for token renumeration but with that personal satisfaction of having joined into the service.

I can personally attest, that counsel for the plaintiffs herein, LORENZO F. PADILLA, ESQ., has been kept extremely busy in his services to the committee throughout the State. In addition thereto, Mr. Padilla has used his own law library, in order to maintain himself abreast of the governing federal law relevant to the work of the committee.

Amongst the many qualities possessed by Mr. Padilla for the position, include his years as a tax collector in New York State, which have given him the necessary knowledge of the fiscal implications of governmental budgets and governmental functions. Dealing with 4½ billion dollars as aforesaid, requires knowledge of the budget and its fiscal implications as it affects all citizens of the State.

In addition thereto, Mr. Padilla is as aforesaid bilingual, very fluent in both Spanish and English, thereby being able to speak to and speak for the more than 2 million hispanics in New York State. The committee must have an input from its hispanics citizens and the committee must also have a spokesman to the aforesaid hispanic citizens.

This deponent would dare say that there is not another committee in either the New York State assembly nor the New York State Senate so fortunate as to have in its service as counsel and attorney and counselor at law as competent for the services and functions of the committees as is Mr. Padilla to the standing committee on social services. This deponent can certainly state to this Court, that there is not within the State of New York another attorney and counselor at law with Mr. Padilla's qualifications to serve in the committee on social services nor in other committees in the legislative body.

This deponent can also certainly state to this Court, that there is a severe shortage of bilingual attorneys to serve the hispanic community in this State. This deponent would join the Hon. John Carro, Judge, Criminal Court of the City of New York, in the need for at least 2,000 more hispanic bilingual attorneys in this area.

WHEREFORE, this deponent joins in the prayer of the plaintiffs, together with all relief as may be just and proper in the premises.

GEORGE W. MILLER

Sworn to before me this
5th day of December, 1975.

AFFIDAVIT OF BERTHA DE FAZIO IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

GILBERTO GERENA VALENTIN, et al., Plaintiffs, -against- PAN AMERICAN WORLD AIRWAYS and EDWIN GLASSER, Defendants.	73 C 1552 AFFIDAVIT IN SUPPORT OF MOTION.

STATE OF NEW YORK)
CITY OF NEW YORK) ss.:
COUNTY OF NEW YORK)

BERTHA DE FAZIO, being duly sworn deposes and says:

1. My maiden name is Bertha Herenandez and as such I am of Hispanic parents.

2. I am a duly licensed bilingual teacher for the New York City Board of Education, having undertaken all required studies and having passed all required examinations qualifying me both for New York State and New York City.

3. I am a bilingual expert and specialist in the field now for a period of eight years. I am presently employed in my specialty at Public School 132 in New York City.

4. I submit this affidavit in support of the instant motion upon my expert knowledge in the field.

5. I have read the affidavit of LORENZO F. PADILLA, Esq., in this motion relative to the bilingual problem of Hispanics in

failure to tender the depositions, then the court has the power

the New York metropolitan area.

6. As an expert I can state that the problem is as stated by Mr. PADILLA, that the great majority of Hispanics are not articulate in either t English or Spanish languages. I personally experience this everyday in classes with the students and with the parents of the students as the parents teachers meetings.

7. I have had and heard long conversations between Hispanics where sentences are commenced in either the Spanish or English language and in the middle of the sentence Spanish or English words are put into the sentence and the sentence finishes in a language other than the language commenced.

8. The problem is that without formal education at the University level in both languages as both Mr. PADILLA and I have had then, neither language is learned or mastered. The result being a hybrid sometimes characterized as "Spanglish."

9. Speaking is not the only problem and, may be a minor problem as relates to the whole situation. It is confused understanding of the both languages that creates the true problem. For most Hispanics in the New York metropolitan Area it is a "dual track in the mind with trains running e-ratically and separately on the dual tract." This erraticism causes misapprehension and erroneous emphasis on the words used in the mixed vocabulary above characterized as "Spanglish."

10. As an expert in the bilingual field, I can advice this

herein. The inquest had for this court, merely is a self

Court that Hispanics, except those with formal educational training really need a bilingual attorney for legal matters. As is explained in the affidavit of the plaintiffs it is more than words, it is legal concepts in the ambivilent legal terminology that determines a legal action. A fortiari, Hispanics need a bilingual attorney for the presentation and prosecution of their legal causes.

11. To illustrate the point. If in the course of a trial a trial judge were to direct a Hispanic witness to, "Answer the Court, (meaning the judge)"; the Hispanic witness is apt to respond "You think I'm crazy talking to the court, (meaning the courthouse)". To a Hispanic the court is the courthouse only. To an American jurist the Court during trial is the trial judge. It is these subtle and tenuous differences in the languages that cause confusions in the aforementioned "dual track."

12. I have observed Mr. PADILLA spend hours with clients in preparation for trial rehearse matters such as illustrated for the proper presentation of a case. It is indeed a specialized education to prepare a Hispanic for a trial in an American court. For the stated specialization only a bilingual attorney can service such a Hispanic party to an action. I know Mr. PADILLA to be competent in the field for the taking of the task.

WHEREFORE, I respectfully join in the prayer of the plaintiffs in this motion, upon my expertise in the field as relates

to the problem as presented herein.

Sworn to before me this

day of December, 1975

BERTHA DE FAZIO

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- -X

GILBERTO GERENA VALENTIN, et al

Plaintiffs,

-against-

PAN AMERICAN WORLD AIRWAYS, INC. and EDWIN GLASSER,

Defendants.

- -X

Civ. #73C1552

AFFIDAVIT IN SUPPORT OF APPLICATION FOR RESTORATION TO TRIAL CALENDAR

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

LORENZO F. PADILLA, esq., BEING DULY SWORN deposes and says:

1. Deponent is the attorney for the plaintiffs herein, and submitts this affadivit in support of the instant motion pursuant to rule 60, upon personal knowledge of all facts recited herein.

2. The instant motion is made within the time limitations of statute, viz, within one year from the date of entry of judgement or order.

3. The basis of the motion is both excusable neglect and fraud, (extrinsic and intrinsic) on the part of the attorneys for the defendant as will be herein and after exposed.

4. The excusable neglect is that this deponent was actually engaged in a trial in an action in a court of competant

jurisdiction, and was specifically ordered by the court of the trial then being had, to be before the court on the date that the inquest herein was taken and these facts were transmitted to the attorneys for the defendant before the date of inquest had herein.

5. A copy of application for a new date, was also transmitted to the court simultaneously, explaining the same circumstances.

6. Notwithstanding the full knowledge of the exigency affecting this deponent, the attorneys for the defendant fraudulently went to court on the date of trial, and undertook an inquest against the plaintiffs herein.

7. The facts herein alleged approved by paragraph #18 of the findings of facts submitted to the court by the attorneys for the defendants. The paragraph goes on to contain a high degree of pettifoggery on the part of the attorneys for the defendant. The pettifoggery is contained in the ascertion that a counsel engaged in a civil court is in a court of inferior jurisdiction.

8. When an attorney is ordered by a court to be and to continue a trial on a specific date, as such attorney should fail to do so, then such an attorney would be definately in contempt of court. The monetary jurisdictional limitations of the court, would have and do not have and never did have any effect upon an attorneys duty to perform a direct order from a trial

court during the course of a trial, even if the court be a justice of the peace court.

9. The pettifoggery of the defendants attorneys continue in this following paragraph numbered 19 of the findings of fact. It is ascerted that this court never read paragraph numbered 19 when it signed such a finding of fact and a conclusion of law. It is significantly ascerted that this court would not force this attorney not any other attorney into a contempt compromise, by compilling a trial against another specifically ordered trial and thereby force any attorney to be contemptuous to both courts. As a matter of fact this court will surely take judicial notice of the annual statements required from attorneys under the crime in justice act, which require that each attorney set forth any and every citation or even a threat of being held in contempt by any court.

10. It is therefore clear, that there was excusable neglect for this attorney not appearing at the time of trial, because this attorney could not be in contempt of a specific order of a court of competent jurisdiction and the attorneys for the defendant being fully aware of the fact, perpertrated both extrinsic and intrinsic fraud by going into the court and taking an inquest against the plaintiffs herein.

11. In further exposing the pettifoggery of the defendants attorneys, paragraphs numbered 1 of the findings of fact through paragraph numbered 14, set forth a lot of criti-

cism in scandal about this attorney. The statements contain in the cited paragraphs are misleading and half truths. The truth relative to the pretrial conferences are as follows:

1. On the first pretrial conference this attorney did attend at the courthouse, but the attorney for the defendant had left, because this attorney was one half hour late. This attorney was one half hour late, because this attorney was requied to attend at a criminal term of the Supreme Court of the State of New York, a jail case, for an arraignment on an indictment.

2. At the second pretrial conference, the attorneys for the defendants had a conflicting engagement and were unable to attend the pretrial conference.

3. On the third dated pretrial conference, the court had a conflicting engagement and could not conduct the pretrial conference.

4. On the fourth date, which was convenient to this attorney, everybody else had conflicting engagements, and could not attend the pretrial conference. In substance, the truth is that everyone involved herein, had faults in not completing the pretrial conferences.

12. The findings of facts, also criticized this counsel, for having objected to questions in the course of the depositions being taken before trial. This counsel was overruled by the court. That does not indicate any fault of counsel

in any manner whatsoever. It is the function of counsel to object, and the duty of counsel to obey the orders of the court. Every time the court overruled an objection, this counsel respected the courts rulings. Query, where is there any criticism of the actions of this counsel in any way, manner or form?

13. By paragraph numbered 6 of the findings of facts, the attorneys for the defendants set forth a very important issue. The very important issue is that the depositions before trial were had before the trial court. This means, that the trial court had received a high degree of information of the facts and circumstances of the action before the trial of the action, and therefore the question of impartiality was sharply focused. In one prior affidavit made by this attorney, this attorney had brought out this very important fact of impartiality to the courts attention; relative to whether this court would transfer the trial to another judge in the district.

14. In addition to the excusable neglect and the extrinsic and intrinsic fraud as here and above exposed, there is also another very serious problem facing all concerned, including this court.

15. The problem is clearly set forth in the affidavits of the plaintiffs herein. The New York Metropolitan area contains between one and two million hispanic citizens. A major portion of these citizens are bilingual in the true sense. That is to say that they speak both Spanish and English without

proper and complete knowledge of either Spanish or English. As a result of the deficiency, these citizens require a bilingual attorney in the scholarly or classic meaning, with knowledge formally and properly of both Spanish and English. The seriousness of the problem has been recognized both judicially and legislatively.

16. This court should take judicial notice of the fact that the civil court of the City of New York requires summonses and complaints to be in both the English and the Spanish language. Same constitutes a judicial recognition of the problem cited.

17. The Bureau of Consumer Affairs of the City of New York, now requires many contracts to also be in both the Spanish and the English language. A photocopy of a contract used by a seller in the city of New York licensed by the Department of Consumer Affairs, is annexed hereto and made part hereof, as exhibit number 1.

18. The United States Congress presently has four separate bills in committee relative to the establishment of bilingual courts. The Senate before it one such bill. Annexed hereto and made part hereof, is the Washington letter of the American Bar Association, indicating the five cited bills.

19. This courts attention is respectfully directed to the New York Law Journal of December 2, 1975 first page, third column, where the Hon. CHARLES E. STEWART, JR., judge,

United States District Court for the southern district of New York, issued a seven page memorandum in the case of TORRES v. SACHS, 73-3921, awarding $23,000.00 in counsel fees, for the prosecution of an action for bilingual ballots in an election in New York.

20. From the above cited judicial, legislative, and administrative actions and proceedings taken upon the issue, there can be no doubt in anyones mind, but that the problems of hispanic litigants, is one of tremendous portions which are not easily resolved, nor can they be so easily dismissed, as the action of the plaintiff's was dismissed by this court.

21. The next affidavit of the Hon. GEORGE W. MILLER, Assemblyman, 71st Assembly District, New York State, shows this court the seriousness of the need for bilingual attorneys in the services of the state, of the city and the federal government. There is approximately a total of twenty million hispanic american citizens, and of that twenty million hispanic-american citizens, there is one hispanic lawyer in the state of New York, specifically dedicated to billions of dollars in federal, state, and city funds. That one hispanic attorney is this deponent. The salary as set forth in the cited affidavit of the Hon. GEORGE W. MILLER, should establish this court, that this deponent is in service to the federal, state and city governments, for the sake of serving the governments and not for a ten thousand dollar annual salary. This attorney made more than

$10,000.00 a year before becoming an attorney, as an automobile mechanic.

22. This attorney, is not in any manner emoted by the criticisms set forth by the attorneys for the defendants in the findings of facts and conclusions of law. The test of an attorney comes in a contested trial, not in an inquest. If the attorneys for the defendants wish to show their superiority, they are welcome to do so in a contested trial.

23. Admittedly there has been some delay caused by this attorney in this action. However, the delay is not the fault of this attorney, but is caused by the factors that have been enumerated in this affidavit. The bar results in the state of New York for the past year, have shown that a total of only ten hispanics have passed the bar examinations to become lawyers in the state of New York. With such a shortage of lawyers competant to represent litigants within the metropolitan area, the hispanics suffer ill treatment under our justice system.

24. This courts attention is respectfully directed to the New York Law Journal, August 18, 1975, first page, second column, wherein the New York County Lawyers Association is specifically critical of the justice system and as the justice affects hispanics in the metropolitan area.

25. The severe shortage of Spanish attorneys was the major topic of discussion of the last dinner meeting of the Puerto Rican barr Association. The guest of honor, the

Hon. JOHN CARRO, judge, Criminal Court of the City of New York, stated that there is a need for a least an additional two thousand hispanic attorneys in the metropolitan area for service to the hispanic community. A statement in corroboration hereof will be pursued from the said judge, and presented to this court.

26. Not only does Judge Carro recognize the need for more hispanic attorneys, but as is shown in the affidavits of the plaintiffs the chief judge of this court, the Hon. JACOB MISCHLER, CAUSED this attorney to conduct a major portion of a trial in Spanish, with the interpretor interpreting to the jury. In another occasion, the Hon. ARNOLD BAUMAN, United States District court judge, for the southern district, caused this attorney to conduct a hearing in Spanish for the defendant.

27. The special difficulties encountered by hispanics in their bilingual expressions, will be further emphasized and amplified by a bilingual teacher, whose affidavit is annexed hereto and made part of this motion.

28. This court attention is respectfully directed at paragraphs numbered 20, 21, and 22, of the findings of facts. It would seem that this court made a finding of fact against the assertions of the defendants themselves. In the motion for the change of venue, the defendants set forth all to be residents of the Eastern District, and as such the Eastern District was the actual location of all of them not requiring transportation

from as far away places as Honolulu.

29. This courts attention is now respectfully directed at paragraph number 5 of the finding of facts wherein the defendants attorneys set forth that neither this attorney nor any representative from this attorneys office appeared at a scheduled conference. What the defendants attorneys failed to state to this court, is that when a representative of bilingual capacity was available in this proceeding, this attorney and this attorneys offices utilized same. More particularly, this courts attention is directed to paragraph number 6 relative to the deposition of JOSEPH MENDEZ RIVERA, which was conducted by the defendants attorneys and ALEX COLGAN, ESQ. an attorney specifically selected by this attorney. The named attorney, ALEX COLGAN, is a gentleman of Irish decent having been born in the city of New York. However, the said ALEX COLGAN, is bilingual in the formal sense heretofore explained in this affidavit. The said ALEX COLGAN, attended studies in the University of Puerto Rico, and completed his law studies in the City of New York, New York Law School, as a classmate of this attorney. The said ALEX COLGAN could not remain in the case nor in the service of this attorney and this attorneys offices, because of his selection and assignment as a Law Assistant in the Supreme Court in the State of New York, First Department. All of this is submitted as evidence on the part of this attorney, to diligently prosecute this action, as humanly possible, against

all of the adverse circumstances.

30. This courts attention is respectfully directed to the last sentence of paragraph number 12 of the findings of facts, wherein the attorneys for the defendants assert having made a motion pursuant to Rule 30 (e) of the Federal Rules of Civil Procedure. Same is totally inaccurate. The motion was made pursuant to Rule 40 of the Federal Rules of Civil Procedure.

31. All in all, the findings of facts and conclusions of law submitted to the court are wholly inaccurate, totally misleading, purposely false, and certainly reprehensible and sensurable in all respects.

32. This attorney has examined this docket and can tell this court, that same is loaded with proceedure, none of which goes to the merits of the action in any respect. There has been a motion for a change of venue upon false statements which are proven by the findings of fact submitted to the court. There was a motion for dismissal of the complaint for failure to appear at depositions in the City of New York, when it was known that the plaintiffs did not have an attorney in the City of New York. There were motions made attacking the appearances at pre-trial conferences, which were denied. There was a motion which was made pursuant to Rule 40 of the Rules of Civil Practice, directing a trial for failure of compliance which is not within the Rule at all. The Rule provides that if there is a

the action to be had between the parties herein

failure to tender the depositions, then the court has the power to order the stenographer who took the deposition to sign same instead of the deponent. There is nothing in the Rule which authorizes the court to order a trial peremptorily against a party for failure to sign a deposition. The court exceeded in statutory jurisdiction in granting the motion.

33. Examination of the docket by this attorney revealed that this action should not have been permitted to remain in the Federal District Court in the Eastern District at all. The action was commenced in Puerto Rico, upon the diversity of citizenship. When the matter was transferred out of Puerto Rico to New York, the action should have been transferred to the State courts, because there was no longer a diversity of citizenship, nor was there any federal agency of federal defendant involved in the action at all. The action was an action between two New York State citizens which should have been properly transferred to the state court for prosecution in the State Court.

34. Be that as it may, the test which should be used herein is whether or not the plaintiffs have a good and meritorious cause of action. The merits of the plaintiffs are set forth in their affidavits, relative to their arrests and relative to free judicial determination in their favor given rise to this cause of action. The defense sets forth certain denials, contrary to the determinations had in favor of the plaintiffs

transportation of witnesses, the defendants are going to be hard-

herein. The inquest had for this court, merely is a self serving declaration, which in no way touches upon the merits. It is significant to note and reiterate that the inquest was held before this court, which court had participated in the pre-trial deposition, thereby affecting the constitutional requirements of an impartial court.

35. As a correllary, this court may consider whether or not the defendant had any defense to the action at all. That is to say if pre-trial depositions required supervisions, then the defendants could have moved the court to name a referee of magistrate to supervise the deposition. If the defendants would have chosen a referee or magistrate to supervise the depositions, then the courts impartiality would not have been affected. To be clear, it is charged herein, that the defendants sought to have the pre-trial depositions before the court, for lack of any defence to the action, to affect the constitutional requirements of an impartial court. Any reading of the pre-trial depositions, clearly establish that same is replete with scandal which in no way affects the merits of the claim, which is false imprisonment and malicious prosecution. The court having participated in the scandal ridden and replete pre-trial depostion, then had a scandalous impression of the plaintiffs. Any scandal which may be attributable to the plaintiffs, has no bearing whatsoever upon their claim herein framed in malicious prosecution, false imprisonment and embarrassment.

36. This attorney takes this opportunity to inform this court, that progress will and is being made by the offices of this attorney. As foresaid in the last group of candidates for admission to the bar, which were two thousand six hundred and fifty eight of which only three were hispanica, these offices have engaged one of the three hispanics to come into the office as a permanent part thereof. So that the difficulty which existed prior hereto, has been ameliorated and will be corrected and the matter will be able to be properly prosecuted in behalf of the plaintiffs, by bilingual attorneys, which are indeed necessary for the plaintiffs herein.

37. This attorney also takes this opportunity to especially ask this court to review the difficulty of the justice system involved herein. By looking at the letterhead used by the offices of the defendants, one immediately observes that there are more than fifty attorneys in the staff of the offices of the attorneys for the defendant. If this court can take the time to review the yellow pages telephone directories for the five boroughs for the cities, it would find that there are less than fifty hispanic lawyers in private practice in the five boroughs. Thus, a defendant of the multi-million dollar magnitude of PAN AMERICAN WORLD, AIRWAYS, can per force of the lack of hispanic attorneys in the five boroughs, by one law office defeat every claim of the hispanics within the five boroughs by the proceeduaral methods which have been employed

in this action; without ever getting to the merits of the claims or the actions. Clearly, this is an unjust situation upon which this court should make a very serious and profound examination for determination of this motion.

38. This courts attention is respectfully directed and redirected to the affidavit of the Hon. GEORGE W. MILLER, relative to the position of this attorney with the New York State Legislature. At the same time, this court is asked to take judicial notice of the extra long term of the New York Legislature and the various special sessions called by the governor of this state, which finally terminated on or about December 6, 1975. As such, this attorney could not prosecute this motion any earlier than has been done.

39. WHEREFORE, it is respectfully requested that the instant motion prosecuted via Rule 60 of the Federal Rule of Civil proceedure, be granted in all respects on the grounds that the plaintiffs have a good and meritorious cause of action, and under further grounds that there did exist excusable neglect, for failure to appear at trial together with extrinsic and intrinsic fraud on the part of the defendants, and under further grounds that the plaintiff should be in the interest of justice granted their day in court in this action, together with all relief being just and proper under law and justice.

Sworn to before me this
5th day of December, 1975.

LORENZO F. PADILLA, ESQ.

AFFIDAVIT OF G. VALENTIN IN SUPPORT OF THE MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- -X

GILBERTO GERENA VALENTIN, et al,

Plaintiffs,

Civil No. 73C1552

-against-

PAN AMERICAN WORLD AIRWAYS, INC., and EDWIN GLASSER,

Defendants.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR RESTORATION TO TRIAL CALENDAR

- -X

STATE OF NEW YORK)
CITY OF NEW YORK) ss.:
COUNTY OF NEW YORK)

GILBERTO GERENA VALENTIN, being duly sworn deposes and says:

1. This deponent is a plaintiff in the above entitled action, and respectfully submits this affidavit to this Court, in support of the motion to restore this case to the trial calendar, and vacate a judgment heretofore had herein, upon a default in appearance at trial, on December 16, 1974, on the grounds that the failure to appear is excusable in all respects, and this affidavit is made upon personal knowledge of all facts and circumstances as will be recited herein.

2. This deponent is informed by counsel and verily believes that an Order was signed by this Court and issued on December 9, 1974, peremptorily accelerating the date of trial of this action, to December 16, 1974.

3. This deponent is informed by counsel and verily be-

lieves that in response to the aforementioned Order, counsel informed adverse counsel and the Court, of being actually engaged in trials in other Courts, and was thereby legally unable to attend the trial as accelerated by Order of this Court.

4. This deponent is informed by counsel and verily believes that the defendants moved this Court pursuant to the provisions of Rule 30, (e) for return of the depositions to the said defendants. It is further alleged that counsel for the plaintiffs failed to comply with some prior Order of the Court. However, the Court granted relief to the defendants, which exceed the provisions of Rule 30, (e). The Court granted an acceleration of the date of trial, together with a peremptory provision, which severely prejudiced the rights of the plaintiffs herein. This deponent is informed by counsel that the Order which was issued by the Court, upon the aforementioned Rule 30, (e), not being within the provisions of the cited Rule may, for all purposes, be void on its face.

5. Counsel for this deponent will explain to the Court, in his separate affidavit, the legal causes and reasons for his inability to appear at trial. As such, this deponent will address himself to the merits of the action solely.

6. The facts and circumstances which gave rise to the action are that on October 30, 1972, around 10:45 P.M., the plaintiffs, who were on board of an airplane of the defendants, regularly known as Flight Number 296, returning to the City of

New York, were caused to be arrested and incarcerated by the defendants without any probable cause or provocation as will hereinafter be shown and proven.

7. After apprehension of this deponent plaintiff on the aforementioned date of October 30, 1972 by a State Police Sergeant, upon the instigation and insistence of the named defendant, EDWIN GLASSER, an employee of the named defendant PAN AMERICAN WORLD AIRWAYS, which employer ratified acts of the named employee, this deponent plaintiff was taken before the Honorable District Judge Federico Montanez, who after hearing all the evidence, found lack of probable cause and ordered this deponent plaintiff released forthwith.

8. Immediately after being released by the aforementioned Judge Montanez, this deponent plaintiff was rearrested by FBI agents, Gillette and Maloney, upon an alleged accusation made by the aforementioned defendant EDWIN GLASSER, as employee of PAN AMERICAN WORLD AIRWAYS. At the time, the FBI agents alleged that the aforementioned defendants had charged this deponent plaintiff and four (4) others with the criminal act of aircraft hijacking, as aforesaid, upon the insistence and instigation of the named defendants.

9. Thereafter, on October 31, 1972, this deponent plaintiff was taken before the Superior Court, Criminal Part, the Honorable Charles Figueroa, presiding, and accused of violations of Federal law and bail was set at $5,000.00. This de-

ponent plaintiff, not having the financial resources to post $5,000.00, was thereby incarcerated in the San Juan District Jail. Thereafter, on November 1, 1972, this deponent plaintiff appeared before the Honorable Hiram R. Cancio, Chief Judge of the United States District Court, for the District, who released the plaintiff on personal bond with appropriate and proper restrictions.

10. Thereafter, at a duly convened term of the Federal Grand Jury, the officers of the United States Attorney for the District including the Commonwealth of Puerto Rico, presented alleged violations of U.S.C. Title 49, Section 1442-j, which said Grand Jury duly deliberated and completely exonerated this deponent plaintiff of the charges as presented and instigated by the named defendants.

11. Thus, there are at least three (3) determinations from judicial sources, favoring this deponent plaintiff and the co-plaintiffs, against the named defendants. It is respectfully submitted then, that this deponent plaintiff has a good and meritorious cause of action to prosecute in the courts.

12. This action was originally commenced in the United States District Court for Puerto Rico. However, the defendants moved for a change of venue on or about July 6, 1973, which motion was granted in August, 1973. This basis upon which the defendants moved for a change of venue, was alleged to be for the convenience of witnesses and the residences of the

parties concerned. In the moving papers for the change of venue, the defendants set forth that the named defendant, EDWIN GLASSER, together with other witnesses, were all employed at the airport located in Queens County, commonly known as John F. Kennedy Airport.

13. The change of venue actually caused a severe problem to this deponent plaintiff and actually caused a great advantage to the named defendants.

14. This Court must judicially notice that there are more Puerto Rican lawyers in Puerto Rico than there are in New York. This Court must also judicially notice that there are more New York lawyers in New York than there are Puerto Rican lawyers. This problem will be further explained in counsel's accompanying affidavit. However, it is of such importance to this deponent plaintiff, that this deponent plaintiff will address this Court on the issue.

15. As aforesaid, the Order changing venue was had on or about August, 1973. However, this deponent plaintiff canvassed more than one hundred (100) lawyers in the City of New York to undertake this action. The lawyers canvassed, could not truthfuly and honestly communicate with all the plaintiffs herein, because of the bilingual factor involved between the plaintiffs and the defendants. As a matter of fact, this deponent plaintiff actually appealed to the highest ranking Spanish-speaking commissioner of the State of New York, Drug Addiction

Control Commission, the Honorable Santiago Grevi, to assist in the procurement of counsel for prosecution of this case. The named Honorable Santiago Grevi, then communicated with present counsel, Lorenzo F. Padilla, Esq., in January, 1974. On or about January 28, 1974, this deponent plaintiff was able to procure the services of the named Lorenzo F. Padilla for this case. To make matters worse, all five (5) plaintiffs imposed upon the named Lorenzo F. Padilla for the prosecution of the case.

16. This deponent plaintiff, along with the other four (4) plaintiffs, especially needed the services of a New York bilingual attorney for the prosecution of this case. This deponent plaintiff knows that in dealing with matters of law, it is concepts as distinguished from words. This deponent plaintiff knows words in English but would not dare attempt to translate those words into legal concepts.

17. To illustrate the seriousness of the issue presented, this deponent plaintiff has been informed by counsel and verily believes the following accounts.

18. Counsel, Lorenzo F. Padilla, Esq., was trying a case before the Chief Judge of this District, the Honorable Jacob Mischler, in the year 1969. The case involved Spanish-speaking South Americans. The Court had an interpreter, together with other interpreters. The matter became so erroneous and confusing that the said Chief Judge, presiding at the trial, directed counsel, Lorenzo F. Padilla, Esq., to conduct the trial

in Spanish and that the interpreters then interpret to the jury. The interpretations given to the jury were in the course thereof, being corrected by the named Lorenzo F. Padilla.

19. This Court's attention is respectfully directed at an affidavit, dated April 29, 1974, entitled an Application for Extension, by the named Lorenzo F. Padilla, Esq., wherein the fourth paragraph thereof shows that the named Lorenzo F. Padilla, Esq., was actually engaged at the United States District Court for the Southern District of New York, in the matter of U.S.A. v. Auria Camacho. The said proceeding was had before the Honorable Arnold Bauman, United States District Judge. The named District Judge, Honorable Arnold Bauman, is, in fact, very fluent in the Spanish language. In the course of the named proceeding, the interpreter was malinterpreting to the defendant. In that proceeding, the Honorable Arnold Bauman, directed counsel Lorenzo F. Padilla, Esq., to properly interpret the matters to the named defendant. The named District Judge, Honorable Arnold Bauman, because of his aforementioned fluency in the Spanish language, approved the translations and interpretations of my counsel, Lorenzo F. Padilla, Esq.

20. Thus, two (2) United States District Judges in this area acknowledge the severity, the seriousness and the importance of proper understanding of proceedings by Spanish-speaking people in this area.

21. Thus, there is a severe problem faced by all con-

cerned in this matter. Counsel has reviewed with this deponent plaintiff, the number of applicants having passed the bar examinations in this State, for the past year. The number who have passed the said bar examination exceed three thousand (3,000). Out of more than three thousand (3,000) having passed the bar examination, are of Hispanic surnames. With a population estimated to be between eight hundred thousand (800,000) and two million two hundred thousand (2,200,000), in the Metropolitan area of Hispanic background, the grave severity of the problem is most evident.

22. Getting back, then, to the depositions which have generated this entire matter, for which the defendants' counsel allege expenditures in the sum of Two Thousand ($2,000.00) Dollars, this Court must weigh the difficulty presented to these plaintiffs and counsel for these plaintiffs in reviewing those depositions and properly executing same and returning same. The depositions must be explained to each and every plaintiff in the Spanish language, as translated from the English language into the legal concepts, as are expressed by the words, which are thought with ambivalence throughout. This Court is respectfully reminded that counsel is dealing with five (5) separate plaintiffs. In the aforementioned cases had before the Honorable Arnold Bauman and the Honorable Jacob Mischler, the Courts were, in each instance, dealing with only one defendant. If the Courts dealing with only one defendant,

found the matter to be so complex as to require counsel to act as an interpreter, translator and corrector, how then can anyone deny the momentous task placed upon this counsel with five (5) ambivalent depositions of five (5) bilingual plaintiffs? The records indicate that there are presently less than one hundred (100) Hispanic bilingual lawyers in New York. O that one hundred (100), seven (7) are members of the judiciary, three (3) are commissioners, one is a full-time employee in the office of the Mayor of the City of New York, and approximately fifteen (15) others are in full-time governmental service, such as Assistant District Attorneys, members of the Corporation Counsel, and other governmental bodies, such as the Civil Rights Commission.

23. In addition thereto, counsel for this deponent plaintiff, was especially selected to serve the New York State Legislature this year, as counsel to the committee on Social Services. The reason for the selection of this counsel to serve on the committee, was due to the special needs and circumstances brought about by the present economic crisis. The chairman of the committee, particularly needed an attorney who could relate to the many Spanish-speaking poor in this State. It is not nor was it ever, a matter of money for counsel for this deponent plaintiff. The salary allotted to this counsel is Ten Thousand ($10,000) Dollars per annum.. The committee is a standing committee, which means that is may meet throughout the entire year.

The records at the fiscal office of the New York State Assembly, clearly show that counsel for this deponent plaintiff is, in fact, the lowest paid counsel in the legislature. Other counsel are paid between Fifteen Thousand ($15,000) and Thirty Three Thousand ($33,000) Dollars for the session only. This deponent plaintiff then takes some pride in knowing that counsel is in sincere and dedicated service to the people and not merely motivated by remuneration. Counsel will, in his accompanying affidavit, set forth that the service in the State Legislature in Albany delayed the prosecution of the instant motion.

24. This deponent plaintiff respectfully requests this Court to weigh whether or not it should have heard this matter at the trial, or whether or not the Court should have disqualified itself due to pretrial exposure to evidence. Counsel for this deponent plaintiff set forth an affidavit on May 13, 1974, paragraph numbered 13 thereof explaining that this Court had presided over the pretrial depositions of the plaintiffs. The Court, as presiding over the depositions, was then called upon to rule upon matters of evidence and matters to be used as evidence by the defendants in the instant case. This very simply means that the Court has been exposed to evidence of the defendants in the scheme and tactic of scandalizing the plaintiffs, all of which could only serve to influence the opinion of the Court against the plaintiffs. This would strongly indicate that the Court may not be impartial at the trial of

the action to be had between the parties herein.

25. Upon the facts and circumstances heretofore alluded to, it would seem obvious why the defendants would move for an accelerated trial date, before this Court as the trial Court of the action. It is very believed by this deponent plaintiff, that all parties are entitled to an impartial Court at all times. The defendants herein, in their scheme to deprive this deponent plaintiff and the coplaintiffs in the action of their day in Court and a fair trial, after having unduly and illicitly prejudiced the Court against the plaintiffs, then sought an inquest from the Court against the plaintiffs. The accompanying affidavit of counsel for this deponent plaintiff, will set forth the lack of professional candor on the part of counsel for the defendants, and as such, same will not be repeated or recited herein. However, this deponent plaintiff, knows that the attorneys for the defendants were well aware of the required appearance of counsel for these plaintiffs, in another Court of competent jurisdiction, making appearance before this Court on the date of inquest, a physical impossibility.

26. This deponent plaintiff very simply alleges that the defendants would suffer no prejudice by the granting of this motion. The defendants themselves moved for a change of venue to this area because it would be convenient to them and to their witnesses. Although, in the unilaterally prepared Findings of Fact and Conclusions of Law, the defendants allege costs for the

transportation of witnesses, the defendants are going to be hard-pressed to show this Court why they set forth, prior thereto, that all their defendants and witnesses were working at John F. Kennedy Airport in New York City. It is then clear, that the defendants are purposely lying to this Court in either of the incidents or in both of the incidents. Lack of truth is easy to the defendants. They lied to the State Police in Puerto Rico. They lied to the FBI agents in Puerto Rico. They lied to the Courts in Puerto Rico, which brought the exoneration of the plaintiffs of all criminal charges. Thus, lying comes easy to the defendants herein.

27. This deponent plaintiff, having read the judgment of this Court after inquest, reads that the defendants allege costs in the sum of Two Thousand Two Hundred ($2,200) Dollars and counsel fees in the sum of Twelve Thousand ($12,000) Dollars, for which the defendants are to have execution thereof. This deponent plaintiff verily believes that teh unilateral allegation was presented to the Court, designed with the purpose of intimidating these plaintiffs from prosecuting their case. The defendants have put those sums of money up to this Court, in bad faith. The proof of the bad faith is proven, by the failure of the defendants in a period now of more than six (6) months, from having made any attempt to execute upon the judgments which they submitted to this Court after inquest. The papers in the Findings of Fact and Conclusions of Law set forth a lot

of untrue scandal about counsel for the plaintiffs herein, however, counsel will attend to that in his own papers to be tendered in conjunction with this application.

28. No prior request for this relief has been made.

WHEREFORE, this plaintiff respectfully requests this Court, pursuant to the provisions of Rule 60, to grant the relief herein requested, together with all other relief as may be deemed just and proper in the premises.

GILBERTO GERENA VALENTIN

Sworn to before me this

day of , 1975.

AFFIDAVIT OF J. MENDEZ IN SUPPORT OF THE MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- -X

GILBERTO GERENA VALENTIN, et al,

Plaintiffs,

Civil No. 73C1552

-against-

PAN AMERICAN WORLD AIRWAYS, INC., and EDWIN GLASSER,

Defendants.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR RESTORATION TO TRIAL CALENDAR

- -X

STATE OF NEW YORK)
CITY OF NEW YORK) ss.:
COUNTY OF NEW YORK)

JOSE MENDEZ, being duly sworn deposes and says:

1. This deponent is a plaintiff in the above entitled action, and respectfully submits this affidavit to this Court in support of the motion to restore this case to the trial calendar, and vacate a judgment heretofore had herein, upon a default in appearance at trial, on December 16, 1974, on the grounds that the failure to appear is excusable in all respects, and this affidavit is made upon personal knowledge of all facts and circumstances as will be recited herein.

2. This deponent is informed by counsel and verily believes that an Order was signed by this Court and issued on December 9, 1974, peremptorily accelerating the date of trial of this action, to December 16, 1974.

3. This deponent is informed by counsel and verily be-

lieves that in response to the aforementioned Order, counsel informed adverse counsel and the Court, of being actually engaged in trials in other Courts, and was thereby legally unable to attend the trial as accelerated by Order of this Court.

4. This deponent is informed by counsel and verily believes that the defendants moved this Court pursuant to the provisions of Rule 30, (e) for return of the depositions to the said defendants. It is further alleged that counsel for the plaintiffs failed to comply with some prior Order of the Court. However, the Court granted relief to the defendants, which exceed the provisions of Rule 30, (e). The Court granted an acceleration of the date of trial, together with a peremptory provision, which severely prejudiced the rights of the plaintiffs herein. This deponent is informed by counsel that the Order which was issued by the Court, upon the aforementioned Rule 30, (e), not being within the provisions of the cited Rule may, for all purposes, be void on its face.

5. Counsel for this deponent will explain to the Court, in his separate affidavit, the legal causes and reasons for his inability to appear at trial. As such, this deponent will address himself to the merits of the action solely.

6. The facts and circumstances which gave rise to the action are that on October 30, 1972, around 10:45 P.M., the plaintiffs, who were on board of an airplane of the defendants, regularly known as Flight Number 296, returning to the City of

New York, were caused to be arrested and incarcerated by the defendants without any probable cause or provocation as will hereinafter be shown and proven.

7. After apprehension of this deponent plaintiff on the aforementioned date of October 30, 1972 by a State Police Sergeant, upon the instigation and insistence of the named defendant, EDWIN GLASSER, an employee of the named defendant PAN AMERICAN WORLD AIRWAYS, which employer ratified acts of the named employee, this deponent plaintiff was taken before the Honorable District Judge Federico Montanez, who after hearing all the evidence, found lack of probable cause and ordered this deponent plaintiff released forthwith.

8. Immediately after being released by the aforementioned Judge Montanez, this deponent plaintiff was rearrested by FBI agents, Gillette and Maloney, upon an alleged accusation made by the aforementioned defendant EDWIN GLASSER, as employee of PAN AMERICAN WORLD AIRWAYS. At the time, the FBI agents alleged that the aforementioned defendants had charged this deponent plaintiff and four (4) others with the criminal act of aircraft hijacking, as aforesaid, upon the insistence and instigation of the named defendants.

9. Thereafter, on October 31, 1972, this deponent plaintiff was taken before the Superior Court, Criminal Part, the Honorable Charles Figueroa, presiding, and accused of violations of Federal law and bail was set at $5,000.00. This de-

ponent plaintiff, not having the financial resources to post $5,000.00, was thereby incarcerated in the San Juan District Jail. Thereafter, on November 1, 1972, this deponent plaintiff appeared before the Honorable Hiram R. Cancio, Chief Judge of the United States District Court, for the District, who released the plaintiff on personal bond with appropriate and proper restrictions.

10. Thereafter, at a duly convened term of the Federal Grand Jury, the officers of the United States Attorney for the District including the Commonwealth of Puerto Rico, presented alleged violations of U.S.C. Title 49, Section 1442-j, which said Grand Jury duly deliberated and completely exonerated this deponent plaintiff of the charges as presented and instigated by the named defendants.

11. Thus, there are at least three (3) determinations from judicial sources, favoring this deponent plaintiff and the co-plaintiffs, against the named defendants. It is respectfully submitted then, that this deponent plaintiff has a good and meritorious cause of action to prosecute in the courts.

12. This action was originally commenced in the United States District Court for Puerto Rico. However, the defendants moved for a change of venue on or about July 6, 1973, which motion was granted in August, 1973. This basis upon which the defendants moved for a change of venue, was alleged to be for the convenience of witnesses and the residences of the

parties concerned. In the moving papers for the change of venue, the defendants set forth that the named defendant, EDWIN GLASSER, together with other witnesses, were all employed at the airport located in Queens County, commonly known as John F. Kennedy Airport.

13. The change of venue actually caused a severe problem to this deponent plaintiff and actually caused a great advantage to the named defendants.

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Control Commission, the Honorable Santiago Grevi, to assist in the procurement of counsel for prosecution of this case. The named Honorable Santiago Grevi, then communicated with present counsel, Lorenzo F. Padilla, Esq., in January, 1974. On or about January 28, 1974, this deponent plaintiff was able to procure the services of the named Lorenzo F. Padilla for this case. To make matters worse, all five (5) plaintiffs imposed upon the named Lorenzo F. Padilla for the prosecution of the case.

16. This deponent plaintiff, along with the other four (4) plaintiffs, especially needed the services of a New York bilingual attorney for the prosecution of this case. This deponent plaintiff knows that in dealing with matters of law, it is concepts as distinguished from words. This deponent plaintiff knows words in English but would not dare attempt to translate those words into legal concepts.

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18. Counsel, Lorenzo F. Padilla, Esq., was trying a case before the Chief Judge of this District, the Honorable Jacob Mischler, in the year 1969. The case involved Spanish-speaking South Americans. The Court had an interpreter, together with other interpreters. The matter became so erroneous and confusing that the said Chief Judge, presiding at the trial, directed counsel, Lorenzo F. Padilla, Esq., to conduct the trial

in Spanish and that the interpreters then interpret to the jury. The interpretations given to the jury were in the course thereof, being corrected by the named Lorenzo F. Padilla.

19. This Court's attention is respectfully directed at an affidavit, dated April 29, 1974, entitled an Application for Extension, by the named Lorenzo F. Padilla, Esq., wherein the fourth paragraph thereof shows that the named Lorenzo F. Padilla, Esq., was actually engaged at the United States District Court for the Southern District of New York, in the matter of U.S.A. v. Auria Camacho. The said proceeding was had before the Honorable Arnold Bauman, United States District Judge. The named District Judge, Honorable Arnold Bauman, is, in fact, very fluent in the Spanish language. In the course of the named proceeding, the interpreter was malinterpreting to the defendant. In that proceeding, the Honorable Arnold Bauman, directed counsel Lorenzo F. Padilla, Esq., to properly interpret the matters to the named defendant. The named District Judge, Honorable Arnold Bauman, because of his aforementioned fluency in the Spanish language, approved the translations and interpretations of my counsel, Lorenzo F. Padilla, Esq.

20. Thus, two (2) United States District Judges in this area acknowledge the severity, the seriousness and the importance of proper understanding of proceedings by Spanish-speaking people in this area.

21. Thus, there is a severe problem faced by all con-

cerned in this matter. Counsel has reviewed with this deponent plaintiff, the number of applicants having passed the bar examinations in this State, for the past year. The number who have passed the said bar examination exceed three thousand (3,000). Out of more than three thousand (3,000) having passed the bar examination, are of Hispanic surnames. With a population estimated to be between eight hundred thousand (800,000) and two million two hundred thousand (2,200,000), in the Metropolitan area of Hispanic background, the grave severity of the problem is most evident.

22. Getting back, then, to the depositions which have generated this entire matter, for which the defendants' counsel allege expenditures in the sum of Two Thousand ($2,000.00) Dollars, this Court must weigh the difficulty presented to these plaintiffs and counsel for these plaintiffs in reviewing those depositions and properly executing same and returning same. The depositions must be explained to each and every plaintiff in the Spanish language, as translated from the English language into the legal concepts, as are expressed by the words, which are thought with ambivalence throughout. This Court is respectfully reminded that counsel is dealing with five (5) separate plaintiffs. In the aforementioned cases had before the Honorable Arnold Bauman and the Honorable Jacob Mischler, the Courts were, in each instance, dealing with only one defendant. If the Courts dealing with only one defendant,

found the matter to be so complex as to require counsel to act as an interpreter, translator and corrector, how then can anyone deny the momentous task placed upon this counsel with five (5) ambivalent depositions of five (5) bilingual plaintiffs? The records indicate that there are presently less than one hundred (100) Hispanic bilingual lawyers in New York. O that one hundred (100), seven (7) are members of the judiciary, three (3) are commissioners, one is a full-time employee in the office of the Mayor of the City of New York, and approximately fifteen (15) others are in full-time governmental service, such as Assistant District Attorneys, members of the Corporation Counsel, and other governmental bodies, such as the Civil Rights Commission.

23. In addition thereto, counsel for this deponent plaintiff, was especially selected to serve the New York State Legislature this year, as counsel to the committee on Social Services. The reason for the selection of this counsel to serve on the committee, was due to the special needs and circumstances brought about by the present economic crisis. The chairman of the committee, particularly needed an attorney who could relate to the many Spanish-speaking poor in this State. It is not nor was it ever, a matter of money for counsel for this deponent plaintiff. The salary allotted to this counsel is Ten Thousand ($10,000) Dollars per annum.. The committee is a standing committee, which means that is may meet throughout the entire year.

The records at the fiscal office of the New York State Assembly, clearly show that counsel for this deponent plaintiff is, in fact, the lowest paid counsel in the legislature. Other counsel are paid between Fifteen Thousand ($15,000) and Thirty Three Thousand ($33,000) Dollars for the session only. This deponent plaintiff then takes some pride in knowing that counsel is in sincere and dedicated service to the people and not merely motivated by remuneration. Counsel will, in his accompanying affidavit, set forth that the service in the State Legislature in Albany delayed the prosecution of the instant motion.

24. This deponent plaintiff respectfully requests this Court to weigh whether or not it should have heard this matter at the trial, or whether or not the Court should have disqualified itself due to pretrial exposure to evidence. Counsel for this deponent plaintiff set forth an affidavit on May 13, 1974, paragraph numbered 13 thereof explaining that this Court had presided over the pretrial depositions of the plaintiffs. The Court, as presiding over the depositions, was then called upon to rule upon matters of evidence and matters to be used as evidence by the defendants in the instant case. This very simply means that the Court has been exposed to evidence of the defendants in the scheme and tactic of scandalizing the plaintiffs, all of which could only serve to influence the opinion of the Court against the plaintiffs. This would strongly indicate that the Court may not be impartial at the trial of

the action to be had between the parties herein.

25. Upon the facts and circumstances heretofore alluded to, it would seem obvious why the defendants would move for an accelerated trial date, before this Court as the trial Court of the action. It is very believed by this deponent plaintiff, that all parties are entitled to an impartial Court at all times. The defendants herein, in their scheme to deprive this deponent plaintiff and the coplaintiffs in the action of their day in Court and a fair trial, after having unduly and illicitly prejudiced the Court against the plaintiffs, then sought an inquest from the Court against the plaintiffs. The accompanying affidavit of counsel for this deponent plaintiff, will set forth the lack of professional candor on the part of counsel for the defendants, and as such, same will not be repeated or recited herein. However, this deponent plaintiff, knows that the attorneys for the defendants were well aware of the required appearance of counsel for these plaintiffs, in another Court of competent jurisdiction, making appearance before this Court on the date of inquest, a physical impossibility.

26. This deponent plaintiff very simply alleges that the defendants would suffer no prejudice by the granting of this motion. The defendants themselves moved for a change of venue to this area because it would be convenient to them and to their witnesses. Although, in the unilaterally prepared Findings of Fact and Conclusions of Law, the defendants allege costs for the

transportation of witnesses, the defendants are going to be hard-pressed to show this Court why they set forth, prior thereto, that all their defendants and witnesses were working at John F. Kennedy Airport in New York City. It is then clear, that the defendants are purposely lying to this Court in either of the incidents or in both of the incidents. Lack of truth is easy to the defendants. They lied to the State Police in Puerto Rico. They lied to the FBI agents in Puerto Rico. They lied to the Courts in Puerto Rico, which brought the exoneration of the plaintiffs of all criminal charges. Thus, lying comes easy to the defendants herein.

27. This deponent plaintiff, having read the judgment of this Court after inquest, reads that the defendants allege costs in the sum of Two Thousand Two Hundred ($2,200) Dollars and counsel fees in the sum of Twelve Thousand ($12,000) Dollars, for which the defendants are to have execution thereof. This deponent plaintiff verily believes that teh unilateral allegation was presented to the Court, designed with the purpose of intimidating these plaintiffs from prosecuting their case. The defendants have put those sums of money up to this Court, in bad faith. The proof of the bad faith is proven, by the failure of the defendants in a period now of more than six (6) months, from having made any attempt to execute upon the judgments which they submitted to this Court after inquest. The papers in the Findings of Fact and Conclusions of Law set forth a lot

of untrue scandal about counsel for the plaintiffs herein, however, counsel will attend to that in his own papers to be tendered in conjunction with this application.

28. No prior request for this relief has been made.

WHEREFORE, this plaintiff respectfully requests this Court, pursuant to the provisions of Rule 60, to grant the relief herein requested, together with all other relief as may be deemed just and proper in the premises.

JOSE MENDEZ

Sworn to before me this

day of , 1975.

AFFIDAVIT OF J. Aponte IN SUPPORT OF THE MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- -X

GILBERTO GERENA VALENTIN, et al,

Plaintiffs,

Civil No. 73C1552

-against-

PAN AMERICAN WORLD AIRWAYS, INC., and EDWIN GLASSER,

Defendants.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR RESTORATION TO TRIAL CALENDAR

- -X

STATE OF NEW YORK)
CITY OF NEW YORK) ss.:
COUNTY OF NEW YORK)

JOSE APONTE being duly sworn deposes and says:

1. This deponent is a plaintiff in the above entitled action, and respectfully submits this affidavit to this Court, in support of the motion to restore this case to the trial calendar, and vacate a judgment heretofore had herein, upon a default in appearance at trial, on December 16, 1974, on the grounds that the failure to appear is excusable in all respects, and this affidavit is made upon personal knowledge of all facts and circumstances as will be recited herein.

2. This deponent is informed by counsel and verily believes that an Order was signed by this Court and issued on December 9, 1974, peremptorily accelerating the date of trial of this action, to December 16, 1974.

3. This deponent is informed by counsel and verily be-

lieves that in response to the aforementioned Order, counsel informed adverse counsel and the Court, of being actually engaged in trials in other Courts, and was thereby legally unable to attend the trial as accelerated by Order of this Court.

4. This deponent is informed by counsel and verily believes that the defendants moved this Court pursuant to the provisions of Rule 30, (e) for return of the depositions to the said defendants. It is further alleged that counsel for the plaintiffs failed to comply with some prior Order of the Court. However, the Court granted relief to the defendants, which exceed the provisions of Rule 30, (e). The Court granted an acceleration of the date of trial, together with a peremptory provision, which severely prejudiced the rights of the plaintiffs herein. This deponent is informed by counsel that the Order which was issued by the Court, upon the aforementioned Rule 30, (e), not being within the provisions of the cited Rule may, for all purposes, be void on its face.

5. Counsel for this deponent will explain to the Court, in his separate affidavit, the legal causes and reasons for his inability to appear at trial. As such, this deponent will address himself to the merits of the action solely.

6. The facts and circumstances which gave rise to the action are that on October 30, 1972, around 10:45 P.M., the plaintiffs, who were on board of an airplane of the defendants, regularly known as Flight Number 296, returning to the City of

New York, were caused to be arrested and incarcerated by the defendants without any probable cause or provocation as will hereinafter be shown and proven.

7. After apprehension of this deponent plaintiff on the aforementioned date of October 30, 1972 by a State Police Sergeant, upon the instigation and insistence of the named defendant, EDWIN GLASSER, an employee of the named defendant PAN AMERICAN WORLD AIRWAYS, which employer ratified acts of the named employee, this deponent plaintiff was taken before the Honorable District Judge Federico Montanez, who after hearing all the evidence, found lack of probable cause and ordered this deponent plaintiff released forthwith.

8. Immediately after being released by the aforementioned Judge Montanez, this deponent plaintiff was rearrested by FBI agents, Gillette and Maloney, upon an alleged accusation made by the aforementioned defendant EDWIN GLASSER, as employee of PAN AMERICAN WORLD AIRWAYS. At the time, the FBI agents alleged that the aforementioned defendants had charged this deponent plaintiff and four (4) others with the criminal act of aircraft hijacking, as aforesaid, upon the insistence and instigation of the named defendants.

9. Thereafter, on October 31, 1972, this deponent plaintiff was taken before the Superior Court, Criminal Part, the Honorable Charles Figueroa, presiding, and accused of violations of Federal law and bail was set at $5,000.00. This de-

ponent plaintiff, not having the financial resources to post $5,000.00, was thereby incarcerated in the San Juan District Jail. Thereafter, on November 1, 1972, this deponent plaintiff appeared before the Honorable Hiram R. Cancio, Chief Judge of the United States District Court, for the District, who released the plaintiff on personal bond with appropriate and proper restrictions.

10. Thereafter, at a duly convened term of the Federal Grand Jury, the officers of the United States Attorney for the District including the Commonwealth of Puerto Rico, presented alleged violations of U.S.C. Title 49, Section 1442-j, which said Grand Jury duly deliberated and completely exonerated this deponent plaintiff of the charges as presented and instigated by the named defendants.

11. Thus, there are at least three (3) determinations from judicial sources, favoring this deponent plaintiff and the co-plaintiffs, against the named defendants. It is respectfully submitted then, that this deponent plaintiff has a good and meritorious cause of action to prosecute in the courts.

12. This action was originally commenced in the United States District Court for Puerto Rico. However, the defendants moved for a change of venue on or about July 6, 1973, which motion was granted in August, 1973. This basis upon which the defendants moved for a change of venue, was alleged to be for the convenience of witnesses and the residences of the

parties concerned. In the moving papers for the change of venue, the defendants set forth that the named defendant, EDWIN GLASSER, together with other witnesses, were all employed at the airport located in Queens County, commonly known as John F. Kennedy Airport.

13. The change of venue actually caused a severe problem to this deponent plaintiff and actually caused a great advantage to the named defendants.

14. This Court must judicially notice that there are more Puerto Rican lawyers in Puerto Rico than there are in New York. This Court must also judicially notice that there are more New York lawyers in New York than there are Puerto Rican lawyers. This problem will be further explained in counsel's accompanying affidavit. However, it is of such importance to this deponent plaintiff, that this deponent plaintiff will address this Court on the issue.

15. As aforesaid, the Order changing venue was had on or about August, 1973. However, this deponent plaintiff canvassed more than one hundred (100) lawyers in the City of New York to undertake this action. The lawyers canvassed, could not truthfuly and honestly communicate with all the plaintiffs herein, because of the bilingual factor involved between the plaintiffs and the defendants. As a matter of fact, this deponent plaintiff actually appealed to the highest ranking Spanish-speaking commissioner of the State of New York, Drug Addiction

Control Commission, the Honorable Santiago Grevi, to assist in the procurement of counsel for prosecution of this case. The named Honorable Santiago Grevi, then communicated with present counsel, Lorenzo F. Padilla, Esq., in January, 1974. On or about January 28, 1974, this deponent plaintiff was able to procure the services of the named Lorenzo F. Padilla for this case. To make matters worse, all five (5) plaintiffs imposed upon the named Lorenzo F. Padilla for the prosecution of the case.

16. This deponent plaintiff, along with the other four (4) plaintiffs, especially needed the services of a New York bilingual attorney for the prosecution of this case. This deponent plaintiff knows that in dealing with matters of law, it is concepts as distinguished from words. This deponent plaintiff knows words in English but would not dare attempt to translate those words into legal concepts.

17. To illustrate the seriousness of the issue presented, this deponent plaintiff has been informed by counsel and verily believes the following accounts.

18. Counsel, Lorenzo F. Padilla, Esq., was trying a case before the Chief Judge of this District, the Honorable Jacob Mischler, in the year 1969. The case involved Spanish-speaking South Americans. The Court had an interpreter, together with other interpreters. The matter became so erroneous and confusing that the said Chief Judge, presiding at the trial, directed counsel, Lorenzo F. Padilla, Esq., to conduct the trial

in Spanish and that the interpreters then interpret to the jury. The interpretations given to the jury were in the course thereof, being corrected by the named Lorenzo F. Padilla.

19. This Court's attention is respectfully directed at an affidavit, dated April 29, 1974, entitled an Application for Extension, by the named Lorenzo F. Padilla, Esq., wherein the fourth paragraph thereof shows that the named Lorenzo F. Padilla, Esq., was actually engaged at the United States District Court for the Southern District of New York, in the matter of U.S.A. v. Auria Camacho. The said proceeding was had before the Honorable Arnold Bauman, United States District Judge. The named District Judge, Honorable Arnold Bauman, is, in fact, very fluent in the Spanish language. In the course of the named proceeding, the interpreter was malinterpreting to the defendant. In that proceeding, the Honorable Arnold Bauman, directed counsel Lorenzo F. Padilla, Esq., to properly interpret the matters to the named defendant. The named District Judge, Honorable Arnold Bauman, because of his aforementioned fluency in the Spanish language, approved the translations and interpretations of my counsel, Lorenzo F. Padilla, Esq.

20. Thus, two (2) United States District Judges in this area acknowledge the severity, the seriousness and the importance of proper understanding of proceedings by Spanish-speaking people in this area.

21. Thus, there is a severe problem faced by all con-

cerned in this matter. Counsel has reviewed with this deponent plaintiff, the number of applicants having passed the bar examinations in this State, for the past year. The number who have passed the said bar examination exceed three thousand (3,000). Out of more than three thousand (3,000) having passed the bar examination, are of Hispanic surnames. With a population estimated to be between eight hundred thousand (800,000) and two million two hundred thousand (2,200,000), in the Metropolitan area of Hispanic background, the grave severity of the problem is most evident.

22. Getting back, then, to the depositions which have generated this entire matter, for which the defendants' counsel allege expenditures in the sum of Two Thousand ($2,000.00) Dollars, this Court must weigh the difficulty presented to these plaintiffs and counsel for these plaintiffs in reviewing those depositions and properly executing same and returning same. The depositions must be explained to each and every plaintiff in the Spanish language, as translated from the English language into the legal concepts, as are expressed by the words, which are thought with ambivalence throughout. This Court is respectfully reminded that counsel is dealing with five (5) separate plaintiffs. In the aforementioned cases had before the Honorable Arnold Bauman and the Honorable Jacob Mischler, the Courts were, in each instance, dealing with only one defendant. If the Courts dealing with only one defendant,

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23. In addition thereto, counsel for this deponent plaintiff, was especially selected to serve the New York State Legislature this year, as counsel to the committee on Social Services. The reason for the selection of this counsel to serve on the committee, was due to the special needs and circumstances brought about by the present economic crisis. The chairman of the committee, particularly needed an attorney who could relate to the many Spanish-speaking poor in this State. It is not nor was it ever, a matter of money for counsel for this deponent plaintiff. The salary allotted to this counsel is Ten Thousand ($10,000) Dollars per annum.. The committee is a standing committee, which means that is may meet throughout the entire year.

the action to be had between the parties here;

The records at the fiscal office of the New York State Assembly, clearly show that counsel for this deponent plaintiff is, in fact, the lowest paid counsel in the legislature. Other counsel are paid between Fifteen Thousand ($15,000) and Thirty Three Thousand ($33,000) Dollars for the session only. This deponent plaintiff then takes some pride in knowing that counsel is in sincere and dedicated service to the people and not merely motivated by remuneration. Counsel will, in his accompanying affidavit, set forth that the service in the State Legislature in Albany delayed the prosecution of the instant motion.

24. This deponent plaintiff respectfully requests this Court to weigh whether or not it should have heard this matter at the trial, or whether or not the Court should have disqualified itself due to pretrial exposure to evidence. Counsel for this deponent plaintiff set forth an affidavit on May 13, 1974, paragraph numbered 13 thereof explaining that this Court had presided over the pretrial depositions of the plaintiffs. The Court, as presiding over the depositions, was then called upon to rule upon matters of evidence and matters to be used as evidence by the defendants in the instant case. This very simply means that the Court has been exposed to evidence of the defendants in the scheme and tactic of scandalizing the plaintiffs, all of which could only serve to influence the opinion of the Court against the plaintiffs. This would strongly indicate that the Court may not be impartial at the trial of

the action to be had between the parties herein.

25. Upon the facts and circumstances heretofore alluded to, it would seem obvious why the defendants would move for an accelerated trial date, before this Court as the trial Court of the action. It is very believed by this deponent plaintiff, that all parties are entitled to an impartial Court at all times. The defendants herein, in their scheme to deprive this deponent plaintiff and the coplaintiffs in the action of their day in Court and a fair trial, after having unduly and illicitly prejudiced the Court against the plaintiffs, then sought an inquest from the Court against the plaintiffs. The accompanying affidavit of counsel for this deponent plaintiff, will set forth the lack of professional candor on the part of counsel for the defendants, and as such, same will not be repeated or recited herein. However, this deponent plaintiff, knows that the attorneys for the defendants were well aware of the required appearance of counsel for these plaintiffs, in another Court of competent jurisdiction, making appearance before this Court on the date of inquest, a physical impossibility.

26. This deponent plaintiff very simply alleges that the defendants would suffer no prejudice by the granting of this motion. The defendants themselves moved for a change of venue to this area because it would be convenient to them and to their witnesses. Although, in the unilaterally prepared Findings of Fact and Conclusions of Law, the defendants allege costs for the

transportation of witnesses, the defendants are going to be hard-pressed to show this Court why they set forth, prior thereto, that all their defendants and witnesses were working at John F. Kennedy Airport in New York City. It is then clear, that the defendants are purposely lying to this Court in either of the incidents or in both of the incidents. Lack of truth is easy to the defendants. They lied to the State Police in Puerto Rico. They lied to the FBI agents in Puerto Rico. They lied to the Courts in Puerto Rico, which brought the exoneration of the plaintiffs of all criminal charges. Thus, lying comes easy to the defendants herein.

27. This deponent plaintiff, having read the judgment of this Court after inquest, reads that the defendants allege costs in the sum of Two Thousand Two Hundred ($2,200) Dollars and counsel fees in the sum of Twelve Thousand ($12,000) Dollars, for which the defendants are to have execution thereof. This deponent plaintiff verily believes that teh unilateral allegation was presented to the Court, designed with the purpose of intimidating these plaintiffs from prosecuting their case. The defendants have put those sums of money up to this Court, in bad faith. The proof of the bad faith is proven, by the failure of the defendants in a period now of more than six (6) months, from having made any attempt to execute upon the judgments which they submitted to this Court after inquest. The papers in the Findings of Fact and Conclusions of Law set forth a lot

of untrue scandal about counsel for the plaintiffs herein, however, counsel will attend to that in his own papers to be tendered in conjunction with this application.

28. No prior request for this relief has been made.

WHEREFORE, this plaintiff respectfully requests this Court, pursuant to the provisions of Rule 60, to grant the relief herein requested, together with all other relief as may be deemed just and proper in the premises.

JOSE APONTE

Sworn to before me this

day of , 1975.

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AFFIDAVIT OF C. REYES , SUPPORT OF THE MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- -X

GILBERTO GERENA VALENTIN, et al,

Plaintiffs,

Civil No. 73C1552

-against-

PAN AMERICAN WORLD AIRWAYS, INC., and EDWIN GLASSER,

Defendants.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR RESTORATION TO TRIAL CALENDAR

- -X

STATE OF NEW YORK)
CITY OF NEW YORK) ss.:
COUNTY OF NEW YORK)

CARLOS REYES being duly sworn deposes and says:

1. This deponent is a plaintiff in the above entitled action, and respectfully submits this affidavit to this Court, in support of the motion to restore this case to the trial calendar, and vacate a judgment heretofore had herein, upon a default in appearance at trial, on December 16, 1974, on the grounds that the failure to appear is excusable in all respects, and this affidavit is made upon personal knowledge of all facts and circumstances as will be recited herein.

2. This deponent is informed by counsel and verily believes that an Order was signed by this Court and issued on December 9, 1974, peremptorily accelerating the date of trial of this action, to December 16, 1974.

3. This deponent is informed by counsel and verily be-

lieves that in response to the aforementioned Order, counsel informed adverse counsel and the Court, of being actually engaged in trials in other Courts, and was thereby legally unable to attend the trial as accelerated by Order of this Court.

4. This deponent is informed by counsel and verily believes that the defendants moved this Court pursuant to the provisions of Rule 30, (e) for return of the depositions to the said defendants. It is further alleged that counsel for the plaintiffs failed to comply with some prior Order of the Court. However, the Court granted relief to the defendants, which exceed the provisions of Rule 30, (e). The Court granted an acceleration of the date of trial, together with a peremptory provision, which severely prejudiced the rights of the plaintiffs herein. This deponent is informed by counsel that the Order which was issued by the Court, upon the aforementioned Rule 30, (e), not being within the provisions of the cited Rule may, for all purposes, be void on its face.

5. Counsel for this deponent will explain to the Court, in his separate affidavit, the legal causes and reasons for his inability to appear at trial. As such, this deponent will address himself to the merits of the action solely.

6. The facts and circumstances which gave rise to the action are that on October 30, 1972, around 10:45 P.M., the plaintiffs, who were on board of an airplane of the defendants, regularly known as Flight Number 296, returning to the City of

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New York, were caused to be arrested and incarcerated by the defendants without any probable cause or provocation as will hereinafter be shown and proven.

7. After apprehension of this deponent plaintiff on the aforementioned date of October 30, 1972 by a State Police Sergeant, upon the instigation and insistence of the named defendant, EDWIN GLASSER, an employee of the named defendant PAN AMERICAN WORLD AIRWAYS, which employer ratified acts of the named employee, this deponent plaintiff was taken before the Honorable District Judge Federico Montanez, who after hearing all the evidence, found lack of probable cause and ordered this deponent plaintiff released forthwith.

8. Immediately after being released by the aforementioned Judge Montanez, this deponent plaintiff was rearrested by FBI agents, Gillette and Maloney, upon an alleged accusation made by the aforementioned defendant EDWIN GLASSER, as employee of PAN AMERICAN WORLD AIRWAYS. At the time, the FBI agents alleged that the aforementioned defendants had charged this deponent plaintiff and four (4) others with the criminal act of aircraft hijacking, as aforesaid, upon the insistence and instigation of the named defendants.

9. Thereafter, on October 31, 1972, this deponent plaintiff was taken before the Superior Court, Criminal Part, the Honorable Charles Figueroa, presiding, and accused of violations of Federal law and bail was set at $5,000.00. This de-

ponent plaintiff, not having the financial resources to post $5,000.00, was thereby incarcerated in the San Juan District Jail. Thereafter, on November 1, 1972, this deponent plaintiff appeared before the Honorable Hiram R. Cancio, Chief Judge of the United States District Court, for the District, who released the plaintiff on personal bond with appropriate and proper restrictions.

10. Thereafter, at a duly convened term of the Federal Grand Jury, the officers of the United States Attorney for the District including the Commonwealth of Puerto Rico, presented alleged violations of U.S.C. Title 49, Section 1442-j, which said Grand Jury duly deliberated and completely exonerated this deponent plaintiff of the charges as presented and instigated by the named defendants.

11. Thus, there are at least three (3) determinations from judicial sources, favoring this deponent plaintiff and the co-plaintiffs, against the named defendants. It is respectfully submitted then, that this deponent plaintiff has a good and meritorious cause of action to prosecute in the courts.

12. This action was originally commenced in the United States District Court for Puerto Rico. However, the defendants moved for a change of venue on or about July 6, 1973, which motion was granted in August, 1973. This basis upon which the defendants moved for a change of venue, was alleged to be for the convenience of witnesses and the residences of the

parties concerned. In the moving papers for the change of venue, the defendants set forth that the named defendant, EDWIN GLASSER, together with other witnesses, were all employed at the airport located in Queens County, commonly known as John F. Kennedy Airport.

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21. Thus, there is a severe problem faced by all con-

cerned in this matter. Counsel has reviewed with this deponent plaintiff, the number of applicants having passed the bar examinations in this State, for the past year. The number who have passed the said bar examination exceed three thousand (3,000). Out of more than three thousand (3,000) having passed the bar examination, are of Hispanic surnames. With a population estimated to be between eight hundred thousand (800,000) and two million two hundred thousand (2,200,000), in the Metropolitan area of Hispanic background, the grave severity of the problem is most evident.

22. Getting back, then, to the depositions which have generated this entire matter, for which the defendants' counsel allege expenditures in the sum of Two Thousand ($2,000.00) Dollars, this Court must weigh the difficulty presented to these plaintiffs and counsel for these plaintiffs in reviewing those depositions and properly executing same and returning same. The depositions must be explained to each and every plaintiff in the Spanish language, as translated from the English language into the legal concepts, as are expressed by the words, which are thought with ambivalence throughout. This Court is respectfully reminded that counsel is dealing with five (5) separate plaintiffs. In the aforementioned cases had before the Honorable Arnold Bauman and the Honorable Jacob Mischler, the Courts were, in each instance, dealing with only one defendant. If the Courts dealing with only one defendant,

found the matter to be so complex as to require counsel to act as an interpreter, translator and corrector, how then can anyone deny the momentous task placed upon this counsel with five (5) ambivalent depositions of five (5) bilingual plaintiffs? The records indicate that there are presently less than one hundred (100) Hispanic bilingual lawyers in New York. O that one hundred (100), seven (7) are members of the judiciary, three (3) are commissioners, one is a full-time employee in the office of the Mayor of the City of New York, and approximately fifteen (15) others are in full-time governmental service, such as Assistant District Attorneys, members of the Corporation Counsel, and other governmental bodies, such as the Civil Rights Commission.

23. In addition thereto, counsel for this deponent plaintiff, was especially selected to serve the New York State Legislature this year, as counsel to the committee on Social Services. The reason for the selection of this counsel to serve on the committee, was due to the special needs and circumstances brought about by the present economic crisis. The chairman of the committee, particularly needed an attorney who could relate to the many Spanish-speaking poor in this State. It is not nor was it ever, a matter of money for counsel for this deponent plaintiff. The salary allotted to this counsel is Ten Thousand ($10,000) Dollars per annum.. The committee is a standing committee, which means that is may meet throughout the entire year.

The records at the fiscal office of the New York State Assembly, clearly show that counsel for this deponent plaintiff is, in fact, the lowest paid counsel in the legislature. Other counsel are paid between Fifteen Thousand ($15,000) and Thirty Three Thousand ($33,000) Dollars for the session only. This deponent plaintiff then takes some pride in knowing that counsel is in sincere and dedicated service to the people and not merely motivated by remuneration. Counsel will, in his accompanying affidavit, set forth that the service in the State Legislature in Albany delayed the prosecution of the instant motion.

24. This deponent plaintiff respectfully requests this Court to weigh whether or not it should have heard this matter at the trial, or whether or not the Court should have disqualified itself due to pretrial exposure to evidence. Counsel for this deponent plaintiff set forth an affidavit on May 13, 1974, paragraph numbered 13 thereof explaining that this Court had presided over the pretrial depositions of the plaintiffs. The Court, as presiding over the depositions, was then called upon to rule upon matters of evidence and matters to be used as evidence by the defendants in the instant case. This very simply means that the Court has been exposed to evidence of the defendants in the scheme and tactic of scandalizing the plaintiffs, all of which could only serve to influence the opinion of the Court against the plaintiffs. This would strongly indicate that the Court may not be impartial at the trial of

the action to be had between the parties herein.

25. Upon the facts and circumstances heretofore alluded to, it would seem obvious why the defendants would move for an accelerated trial date, before this Court as the trial Court of the action. It is very believed by this deponent plaintiff, that all parties are entitled to an impartial Court at all times. The defendants herein, in their scheme to deprive this deponent plaintiff and the coplaintiffs in the action of their day in Court and a fair trial, after having unduly and illicitly prejudiced the Court against the plaintiffs, then sought an inquest from the Court against the plaintiffs. The accompanying affidavit of counsel for this deponent plaintiff, will set forth the lack of professional candor on the part of counsel for the defendants, and as such, same will not be repeated or recited herein. However, this deponent plaintiff, knows that the attorneys for the defendants were well aware of the required appearance of counsel for these plaintiffs, in another Court of competent jurisdiction, making appearance before this Court on the date of inquest, a physical impossibility.

26. This deponent plaintiff very simply alleges that the defendants would suffer no prejudice by the granting of this motion. The defendants themselves moved for a change of venue to this area because it would be convenient to them and to their witnesses. Although, in the unilaterally prepared Findings of Fact and Conclusions of Law, the defendants allege costs for the

transportation of witnesses, the defendants are going to be hard-pressed to show this Court why they set forth, prior thereto, that all their defendants and witnesses were working at John F. Kennedy Airport in New York City. It is then clear, that the defendants are purposely lying to this Court in either of the incidents or in both of the incidents. Lack of truth is easy to the defendants. They lied to the State Police in Puerto Rico. They lied to the FBI agents in Puerto Rico. They lied to the Courts in Puerto Rico, which brought the exoneration of the plaintiffs of all criminal charges. Thus, lying comes easy to the defendants herein.

27. This deponent plaintiff, having read the judgment of this Court after inquest, reads that the defendants allege costs in the sum of Two Thousand Two Hundred ($2,200) Dollars and counsel fees in the sum of Twelve Thousand ($12,000) Dollars, for which the defendants are to have execution thereof. This deponent plaintiff verily believes that teh unilateral allegation was presented to the Court, designed with the purpose of intimidating these plaintiffs from prosecuting their case. The defendants have put those sums of money up to this Court, in bad faith. The proof of the bad faith is proven, by the failure of the defendants in a period now of more than six (6) months, from having made any attempt to execute upon the judgments which they submitted to this Court after inquest. The papers in the Findings of Fact and Conclusions of Law set forth a lot

of untrue scandal about counsel for the plaintiffs herein, however, counsel will attend to that in his own papers to be tendered in conjunction with this application.

28. No prior request for this relief has been made.

WHEREFORE, this plaintiff respectfully requests this Court, pursuant to the provisions of Rule 60, to grant the relief herein requested, together with all other relief as may be deemed just and proper in the premises.

CARLOS REYES

Sworn to before me this

day of , 1975.

AFFIDAVIT OF J. FLORES IN SUPPORT OF THE MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- -X

GILBERTO GERENA VALENTIN, et al,

Plaintiffs,

Civil No. 73C1552

-against-

PAN AMERICAN WORLD AIRWAYS, INC., and EDWIN GLASSER,

Defendants.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR RESTORATION TO TRIAL CALENDAR

- -X

STATE OF NEW YORK)
CITY OF NEW YORK) ss.:
COUNTY OF NEW YORK)

JORGE FLORES , being duly sworn deposes and says:

1. This deponent is a plaintiff in the above entitled action, and respectfully submits this affidavit to this Court, in support of the motion to restore this case to the trial calendar, and vacate a judgment heretofore had herein, upon a default in appearance at trial, on December 16, 1974, on the grounds that the failure to appear is excusable in all respects, and this affidavit is made upon personal knowledge of all facts and circumstances as will be recited herein.

2. This deponent is informed by counsel and verily believes that an Order was signed by this Court and issued on December 9, 1974, peremptorily accelerating the date of trial of this action, to December 16, 1974.

3. This deponent is informed by counsel and verily be-

lieves that in response to the aforementioned Order, counsel informed adverse counsel and the Court, of being actually engaged in trials in other Courts, and was thereby legally unable to attend the trial as accelerated by Order of this Court.

4. This deponent is informed by counsel and verily believes that the defendants moved this Court pursuant to the provisions of Rule 30, (e) for return of the depositions to the said defendants. It is further alleged that counsel for the plaintiffs failed to comply with some prior Order of the Court. However, the Court granted relief to the defendants, which exceed the provisions of Rule 30, (e). The Court granted an acceleration of the date of trial, together with a peremptory provision, which severely prejudiced the rights of the plaintiffs herein. This deponent is informed by counsel that the Order which was issued by the Court, upon the aforementioned Rule 30, (e), not being within the provisions of the cited Rule may, for all purposes, be void on its face.

5. Counsel for this deponent will explain to the Court, in his separate affidavit, the legal causes and reasons for his inability to appear at trial. As such, this deponent will address himself to the merits of the action solely.

6. The facts and circumstances which gave rise to the action are that on October 30, 1972, around 10:45 P.M., the plaintiffs, who were on board of an airplane of the defendants, regularly known as Flight Number 296, returning to the City of

[illegible] by the

New York, were caused to be arrested and incarcerated by the defendants without any probable cause or provocation as will hereinafter be shown and proven.

7. After apprehension of this deponent plaintiff on the aforementioned date of October 30, 1972 by a State Police Sergeant, upon the instigation and insistence of the named defendant, EDWIN GLASSER, an employee of the named defendant PAN AMERICAN WORLD AIRWAYS, which employer ratified acts of the named employee, this deponent plaintiff was taken before the Honorable District Judge Federico Montanez, who after hearing all the evidence, found lack of probable cause and ordered this deponent plaintiff released forthwith.

8. Immediately after being released by the aforementioned Judge Montanez, this deponent plaintiff was rearrested by FBI agents, Gillette and Maloney, upon an alleged accusation made by the aforementioned defendant EDWIN GLASSER, as employee of PAN AMERICAN WORLD AIRWAYS. At the time, the FBI agents alleged that the aforementioned defendants had charged this deponent plaintiff and four (4) others with the criminal act of aircraft hijacking, as aforesaid, upon the insistence and instigation of the named defendants.

9. Thereafter, on October 31, 1972, this deponent plaintiff was taken before the Superior Court, Criminal Part, the Honorable Charles Figueroa, presiding, and accused of violations of Federal law and bail was set at $5,000.00. This de-

ponent plaintiff, not having the financial resources to post $5,000.00, was thereby incarcerated in the San Juan District Jail. Thereafter, on November 1, 1972, this deponent plaintiff appeared before the Honorable Hiram R. Cancio, Chief Judge of the United States District Court, for the District, who released the plaintiff on personal bond with appropriate and proper restrictions.

10. Thereafter, at a duly convened term of the Federal Grand Jury, the officers of the United States Attorney for the District including the Commonwealth of Puerto Rico, presented alleged violations of U.S.C. Title 49, Section 1442-j, which said Grand Jury duly deliberated and completely exonerated this deponent plaintiff of the charges as presented and instigated by the named defendants.

11. Thus, there are at least three (3) determinations from judicial sources, favoring this deponent plaintiff and the co-plaintiffs, against the named defendants. It is respectfully submitted then, that this deponent plaintiff has a good and meritorious cause of action to prosecute in the courts.

12. This action was originally commenced in the United States District Court for Puerto Rico. However, the defendants moved for a change of venue on or about July 6, 1973, which motion was granted in August, 1973. This basis upon which the defendants moved for a change of venue, was alleged to be for the convenience of witnesses and the residences of the

parties concerned. In the moving papers for the change of venue, the defendants set forth that the named defendant, EDWIN GLASSER, together with other witnesses, were all employed at the airport located in Queens County, commonly known as John F. Kennedy Airport.

13. The change of venue actually caused a severe problem to this deponent plaintiff and actually caused a great advantage to the named defendants.

14. This Court must judicially notice that there are more Puerto Rican lawyers in Puerto Rico than there are in New York. This Court must also judicially notice that there are more New York lawyers in New York than there are Puerto Rican lawyers. This problem will be further explained in counsel's accompanying affidavit. However, it is of such importance to this deponent plaintiff, that this deponent plaintiff will address this Court on the issue.

15. As aforesaid, the Order changing venue was had on or about August, 1973. However, this deponent plaintiff canvassed more than one hundred (100) lawyers in the City of New York to undertake this action. The lawyers canvassed, could not truthfuly and honestly communicate with all the plaintiffs herein, because of the bilingual factor involved between the plaintiffs and the defendants. As a matter of fact, this deponent plaintiff actually appealed to the highest ranking Spanish-speaking commissioner of the State of New York, Drug Addiction

Control Commission, the Honorable Santiago Grevi, to assist in the procurement of counsel for prosecution of this case. The named Honorable Santiago Grevi, then communicated with present counsel, Lorenzo F. Padilla, Esq., in January, 1974. On or about January 28, 1974, this deponent plaintiff was able to procure the services of the named Lorenzo F. Padilla for this case. To make matters worse, all five (5) plaintiffs imposed upon the named Lorenzo F. Padilla for the prosecution of the case.

16. This deponent plaintiff, along with the other four (4) plaintiffs, especially needed the services of a New York bilingual attorney for the prosecution of this case. This deponent plaintiff knows that in dealing with matters of law, it is concepts as distinguished from words. This deponent plaintiff knows words in English but would not dare attempt to translate those words into legal concepts.

17. To illustrate the seriousness of the issue presented, this deponent plaintiff has been informed by counsel and verily believes the following accounts.

18. Counsel, Lorenzo F. Padilla, Esq., was trying a case before the Chief Judge of this District, the Honorable Jacob Mischler, in the year 1969. The case involved Spanish-speaking South Americans. The Court had an interpreter, together with other interpreters. The matter became so erroneous and confusing that the said Chief Judge, presiding at the trial, directed counsel, Lorenzo F. Padilla, Esq., to conduct the trial

in Spanish and that the interpreters then interpret to the jury. The interpretations given to the jury were in the course thereof, being corrected by the named Lorenzo F. Padilla.

19. This Court's attention is respectfully directed at an affidavit, dated April 29, 1974, entitled an Application for Extension, by the named Lorenzo F. Padilla, Esq., wherein the fourth paragraph thereof shows that the named Lorenzo F. Padilla, Esq., was actually engaged at the United States District Court for the Southern District of New York, in the matter of U.S.A. v. Auria Camacho. The said proceeding was had before the Honorable Arnold Bauman, United States District Judge. The named District Judge, Honorable Arnold Bauman, is, in fact, very fluent in the Spanish language. In the course of the named proceeding, the interpreter was malinterpreting to the defendant. In that proceeding, the Honorable Arnold Bauman, directed counsel Lorenzo F. Padilla, Esq., to properly interpret the matters to the named defendant. The named District Judge, Honorable Arnold Bauman, because of his aforementioned fluency in the Spanish language, approved the translations and interpretations of my counsel, Lorenzo F. Padilla, Esq.

20. Thus, two (2) United States District Judges in this area acknowledge the severity, the seriousness and the importance of proper understanding of proceedings by Spanish-speaking people in this area.

21. Thus, there is a severe problem faced by all con-

cerned in this matter. Counsel has reviewed with this deponent plaintiff, the number of applicants having passed the bar examinations in this State, for the past year. The number who have passed the said bar examination exceed three thousand (3,000). Out of more than three thousand (3,000) having passed the bar examination, are of Hispanic surnames. With a population estimated to be between eight hundred thousand (800,000) and two million two hundred thousand (2,200,000), in the Metropolitan area of Hispanic background, the grave severity of the problem is most evident.

22. Getting back, then, to the depositions which have generated this entire matter, for which the defendants' counsel allege expenditures in the sum of Two Thousand ($2,000.00) Dollars, this Court must weigh the difficulty presented to these plaintiffs and counsel for these plaintiffs in reviewing those depositions and properly executing same and returning same. The depositions must be explained to each and every plaintiff in the Spanish language, as translated from the English language into the legal concepts, as are expressed by the words, which are thought with ambivalence throughout. This Court is respectfully reminded that counsel is dealing with five (5) separate plaintiffs. In the aforementioned cases had before the Honorable Arnold Bauman and the Honorable Jacob Mischler, the Courts were, in each instance, dealing with only one defendant. If the Courts dealing with only one defendant,

found the matter to be so complex as to require counsel to act as an interpreter, translator and corrector, how then can anyone deny the momentous task placed upon this counsel with five (5) ambivalent depositions of five (5) bilingual plaintiffs? The records indicate that there are presently less than one hundred (100) Hispanic bilingual lawyers in New York. O that one hundred (100), seven (7) are members of the judiciary, three (3) are commissioners, one is a full-time employee in the office of the Mayor of the City of New York, and approximately fifteen (15) others are in full-time governmental service, such as Assistant District Attorneys, members of the Corporation Counsel, and other governmental bodies, such as the Civil Rights Commission.

23. In addition thereto, counsel for this deponent plaintiff, was especially selected to serve the New York State Legislature this year, as counsel to the committee on Social Services. The reason for the selection of this counsel to serve on the committee, was due to the special needs and circumstances brought about by the present economic crisis. The chairman of the committee, particularly needed an attorney who could relate to the many Spanish-speaking poor in this State. It is not nor was it ever, a matter of money for counsel for this deponent plaintiff. The salary allotted to this counsel is Ten Thousand ($10,000) Dollars per annum.. The committee is a standing committee, which means that is may meet throughout the entire year.

The records at the fiscal office of the New York State Assembly, clearly show that counsel for this deponent plaintiff is, in fact, the lowest paid counsel in the legislature. Other counsel are paid between Fifteen Thousand ($15,000) and Thirty Three Thousand ($33,000) Dollars for the session only. This deponent plaintiff then takes some pride in knowing that counsel is in sincere and dedicated service to the people and not merely motivated by remuneration. Counsel will, in his accompanying affidavit, set forth that the service in the State Legislature in Albany delayed the prosecution of the instant motion.

24. This deponent plaintiff respectfully requests this Court to weigh whether or not it should have heard this matter at the trial, or whether or not the Court should have disqualified itself due to pretrial exposure to evidence. Counsel for this deponent plaintiff set forth an affidavit on May 13, 1974, paragraph numbered 13 thereof explaining that this Court had presided over the pretrial depositions of the plaintiffs. The Court, as presiding over the depositions, was then called upon to rule upon matters of evidence and matters to be used as evidence by the defendants in the instant case. This very simply means that the Court has been exposed to evidence of the defendants in the scheme and tactic of scandalizing the plaintiffs, all of which could only serve to influence the opinion of the Court against the plaintiffs. This would strongly indicate that the Court may not be impartial at the trial of

the action to be had between the parties herein.

25. Upon the facts and circumstances heretofore alluded to, it would seem obvious why the defendants would move for an accelerated trial date, before this Court as the trial Court of the action. It is very believed by this deponent plaintiff, that all parties are entitled to an impartial Court at all times. The defendants herein, in their scheme to deprive this deponent plaintiff and the coplaintiffs in the action of their day in Court and a fair trial, after having unduly and illicitly prejudiced the Court against the plaintiffs, then sought an inquest from the Court against the plaintiffs. The accompanying affidavit of counsel for this deponent plaintiff, will set forth the lack of professional candor on the part of counsel for the defendants, and as such, same will not be repeated or recited herein. However, this deponent plaintiff, knows that the attorneys for the defendants were well aware of the required appearance of counsel for these plaintiffs, in another Court of competent jurisdiction, making appearance before this Court on the date of inquest, a physical impossibility.

26. This deponent plaintiff very simply alleges that the defendants would suffer no prejudice by the granting of this motion. The defendants themselves moved for a change of venue to this area because it would be convenient to them and to their witnesses. Although, in the unilaterally prepared Findings of Fact and Conclusions of Law, the defendants allege costs for the

transportation of witnesses, the defendants are going to be hard-pressed to show this Court why they set forth, prior thereto, that all their defendants and witnesses were working at John F. Kennedy Airport in New York City. It is then clear, that the defendants are purposely lying to this Court in either of the incidents or in both of the incidents. Lack of truth is easy to the defendants. They lied to the State Police in Puerto Rico. They lied to the FBI agents in Puerto Rico. They lied to the Courts in Puerto Rico, which brought the exoneration of the plaintiffs of all criminal charges. Thus, lying comes easy to the defendants herein.

27. This deponent plaintiff, having read the judgment of this Court after inquest, reads that the defendants allege costs in the sum of Two Thousand Two Hundred ($2,200) Dollars and counsel fees in the sum of Twelve Thousand ($12,000) Dollars, for which the defendants are to have execution thereof. This deponent plaintiff verily believes that teh unilateral allegation was presented to the Court, designed with the purpose of intimidating these plaintiffs from prosecuting their case. The defendants have put those sums of money up to this Court, in bad faith. The proof of the bad faith is proven, by the failure of the defendants in a period now of more than six (6) months, from having made any attempt to execute upon the judgments which they submitted to this Court after inquest. The papers in the Findings of Fact and Conclusions of Law set forth a lot

of untrue scandal about counsel for the plaintiffs herein, however, counsel will attend to that in his own papers to be tendered in conjunction with this application.

28. No prior request for this relief has been made.

WHEREFORE, this plaintiff respectfully requests this Court, pursuant to the provisions of Rule 60, to grant the relief herein requested, together with all other relief as may be deemed just and proper in the premises.

JORGE FLORES

Sworn to before me this

day of , 1975.

AFFIDAVIT OF BERTHA DE FAZIO IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

GILBERTO GERENA VALENTIN, et al., Plaintiffs, -against- PAN AMERICAN WORLD AIRWAYS and EDWIN GLASSER, Defendants.	73 C 1552 AFFIDAVIT IN SUPPORT OF MOTION.

STATE OF NEW YORK)
CITY OF NEW YORK) ss.:
COUNTY OF NEW YORK)

BERTHA DE FAZIO, being duly sworn deposes and says:

1. My maiden name is Bertha Hernandez and as such I am of Hispanic parents.

2. I am a duly licensed bilingual teacher for the New York City Board of Education, having undertaken all required studies and having passed all required examinations qualifying me both for New York State and New York City.

3. I am a bilingual expert and specialist in the field now for a period of eight years. I am presently employed in my specialty at Public School 132 in New York City.

4. I submit this affidavit in support of the instant motion upon my expert knowledge in the field.

5. I have read the affidavit of LORENZO F. PADILLA, Esq., in this motion relative to the bilingual problem of Hispanics in the New York metropolitan area.

6. As an expert I can state that the problem is as stated by Mr. PADILLA, that the great majority of Hispanics are not articulate in either the English or Spanish languages. I personally experience this everyday in classes with the students and with the parents of the students at the parents teachers meetings.

7. I have had and heard long conversations between Hispanics where sentences are commenced in either the Spanish or English language and in the middle of the sentence Spanish or English words are put into the sentence and the sentence finishes in a language other than the language commenced.

8. The problem is that without formal education at the University level in both languages as both Mr. PADILLA and I have had then, neither language is learned or mastered. The result being a hybrid sometimes characterized as "Spanglish."

9. Speaking is not the only problem and, may be a minor problem as relates to the whole situation. It is confused understanding of the both languages that creates the true problem. For most Hispanics in the New York metropolitan Area it is a "dual track in the mind with trains running e-ratically and separately on the dual track." This erraticism causes misapprehension and erroneous emphasis on the words used in the mixed vocabulary above characterized as "Spanglish."

10. As an expert in the bilingual field, I can advice this Court that Hispanics, except those with formal educational

training really need a bilingual attorney for legal matters. As is explained in the affidavit of the plaintiffs it is more than words, it is legal concepts in the ambivilent legal terminology that determines a legal action. A fortiari, Hispanics need a bilingual attorney for the presentation and prosecution of their legal causes.

11. To illustrate the point. If in the course of a trial a trial judge were to direct a Hispanic witness to, "Answer the Court, (meaning the judge)"; the Hispanic witness is apt to respond "You think I'm crazy talking to the court, (meaning the courthouse) To a Hispanic the court is the courthouse only. To an American jurist the Court during trial is the trial judge. It is these subtle and tenuous differences in the languages that cause confusions in the aforementioned "dual track."

12. I have observed Mr. PADILLA spend hours with clients in preparation for trial rehearse matters such as illustrated for the proper presentation of a case. It is indeed a specialized education to prepare a Hispanic for a trial in an American court. For the stated specialization only a bilingual attorney can service such a Hispanic party to an action. I know Mr. PADILLA to be competent in the field for the taking of the task.

WHEREFORE, I respectfully join in the prayer of the plaintiffs in this motion, upon my expertise in the field as relates

to the problem as presented herein.

BERTHA DE FAZIO

Sworn to before me this

5th day of December, 1975.

EXHIBIT A

Committee Action Ahead

Real Estate Settlement Procedures Act Amendments -- House Banking Subcommittee on Housing and Community Developments -- markup on various bills to suspend or repeal various sections of the law, throughout November, tentative.

Bankruptcy Law Revision -- House Judiciary Subcommittee on Civil and Constitutional Rights -- hearings continue on HR 31 and HR 32. Nov. 7. Senate Judiciary Subcommittee on Improvements in Judicial Machinery -- hearings on S 235, S 236. Nov. 5.

LEAA -- Senate Judiciary Subcommittee on Criminal Laws and Procedures -- hearings continue on legislation to amend Omnibus Crime Control and Safe Streets Act, Nov. 4. Hearings continue before the same Senate Judiciary Subcommittee on LEAA legislation and the State Courts Improvement Act, Dec. 10, 11, tentative.

Gun Control -- House Judiciary Subcommittee on Crime -- markup continues on all pending bills. Nov. 5,6. Senate Judiciary Subcommittee to Investigate Juvenile Delinquency -- markup begins on all pendings bills, Nov. 7.

Crime Victim's Compensation -- House Judiciary Subcommittee on Criminal Justice -- hearings on HR 9074. Nov. 4 and 18. THE ABA WILL BE REPRESENTED BY DONALD E. SANTARELLI, WHO WILL TESTIFY IN SUPPORT OF THIS LEGISLATION.

Housing -- Senate Committee on Banking, Housing and Urban Affairs -- oversight hearings on Department of Housing and Urban Developments, Nov. 5.

Military Lawyers Pay -- House Armed Services Subcommittee No. 4 -- hearings on HR 4372, providing for increased special pay for members of the Judge Advocate General's Corps, Nov. 12 - 13. THE AMERICAN BAR ASSOCIATION'S SUPPORT OF THIS BILL WILL BE PRESENTED BY JAMES ARTHUR GLEASON.

Bilingual Courts -- House Judiciary Subcommittee on Civil and Constitutional Rights -- hearings on S 565, HR 2243, HR 2255, HR 4096, HR 8314. Nov. 5-6.

Copyright Law Revision -- House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice -- hearings continue on HR 2223, Nov. 6.

Open Government -- House Government Operations Subcommittee on Government Information & Indvidual Rights -- hearings begin on HR 9868, HR 10315. Nov.6,7,12. CHAIRMAN OF THE ABA SECTION OF ADMINISTRATIVE LAW, JERRE S. WILLIAMS, WILL TESTIFY IN GENERAL SUPPORT OF THE LEGISLATION.

American Bar Association
Governmental Relations Office
1800 M St N.W.
Washington D.C. 20036
(202) 331-2200

, 1974

EXHIBIT B

18. Have you ever been (a) subject to disciplinary proceedings by a court or bar association? _____ (b) subject to contempt proceedings in any court? _____ (c) convicted of a crime? _____

If the answer is yes to any of the foregoing, furnish complete details, including disposition of the charge or proceeding.* _____

19. Do you have any comments or suggestions in respect to the operation of the Criminal Justice Act program in this District? _____

We will be grateful for your assistance in this regard and would appreciate your reply by July 31, 1974.

Sincerely,

John B. Bosch

U.S.D.J.
Chairman

* Disclosure of the information called for in question 18 is a continuing responsibility and should be made to the Court promptly upon the occurrence of any such charge or proceeding.

AFFIDAVIT OF WM. JUNKERMAN IN OPPOSITION

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

GILBERTO GERENA VALENTIN, et al., Plaintiffs,	AFFIDAVIT IN OPPOSITION
-against-	73 C 1552
PAN AMERICAN WORLD AIRWAYS, INC. and EDWIN H. GLASER, Defendants.	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

WILLIAM J. JUNKERMAN, being duly sworn, deposes and says:

1. I am an attorney-at-law and a member of the firm of Haight, Gardner, Poor & Havens, attorneys for defendant Pan American World Airways, Inc. (hereinafter "Pan American") in the above-captioned action, and I am fully familiar with all of the facts and circumstances set forth herein. I make this affidavit in opposition to plaintiffs' motion pursuant to Rule 60 of the Federal Rules of Civil Procedure to set aside the judgment, findings of fact and conclusions of law entered herein on December 19, 1974.

2. It is not your deponent's desire to repeat ancient history. Nevertheless, in order to fully demonstrate the numerous grounds which existed for this Court's granting

of defendant's motion made in open court on December 16,, 1974 to dismiss this action pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, it will once again be necessary chronologically to set forth the incredible number of times prior to December 16, 1974 that the plaintiffs and the attorney for the plaintiffs in this action had been in default on motions brought before this Court; had failed to appear for scheduled pre-trial examinations; and had contemptuously disregarded orders of this Court; culminating, finally, in the complete failure of the plaintiffs and their attorney to appear in this Court on December 16, 1974 for the peremptorily ordered trial of this action.

3. Prior to setting forth in detail once again the dilatory conduct of the plaintiffs and their attorney in this action, it will first be necessary to refute the erroneous and unfounded allegations contained in the plaintiffs' attorney's instant motion papers. First of all, and most importantly, it must be emphasized that the plaintiffs' attorney has served this motion almost one year after the date of entry of this Court's judgment dismissing this action for lack of prosecution. While this motion is within the outer time limit of Rule 60(b) of the Federal Rules of Civil Procedure, as is demonstrated in the accompanying memorandum of law a party is also obliged to move pursuant to Rule 60(b) as soon as reasonably possible following the entry of a judgment in order to have an application for such

extraordinary relief even considered. It must therefore be emphasized that the plaintiffs' attorney's motion papers do not contain a single argument that was not made or could not have been made on December 19, 1974, as easily as December 19, 1975.

4. It is also particularly significant that the plaintiffs chose not to appeal Judge Bruchhausen's judgment of December 19, 1974. The plaintiffs' attorney's motion papers are filled with innumerable and irrelevant affidavits as to how busy he has been and how valuable he is to the Hispanic community, but it is hard to imagine any attorney being so busy that he could not take fifteen minutes to prepare a notice of appeal. In fact, your deponent is more than willing to admit that following the expiration of the period of appeal from Judge Bruchhausen's judgment of December 19, 1974, your deponent had closed out his file on this case. Moreover, on January 27, 1975, when your deponent had a clerk from this office check to see whether a notice of appeal had been filed, your deponent learned that in addition to no such notice having been filed, this Court's docket sheet on this case had been transferred to the closed file.

5. It must also be pointed out that, other than indicating that this motion is being brought pursuant to Rule 60(b), the plaintiffs' attorney's motion papers do not contain any discussion of law whatsoever. Instead, the plaintiffs'

attorney has chosen to rely on an endless stream of meaningless affidavits setting forth allegations which have no relevance to this matter whatsoever. None of these allegations explain or justify the failure of the plaintiffs and plaintiffs' counsel to prosecute this action in a proper fashion. The plaintiffs and their counsel cannot accurately claim that exceptional circumstances exist in this case. The only relevant exceptional aspect of this case has been the flagrant disregard by the plaintiffs and their counsel of this Court's orders and the Federal Rules of Civil Procedure. Even if the circumstances described in the affidavits submitted in support of plaintiffs' motion were considered to be exceptional, the plaintiffs and their attorney have still not demonstrated the actual direct connection between any such circumstances and their failure to prosecute this particular action. As demonstrated in the accompanying memorandum of law, a party moving pursuant to Rule 60(b) must articulate the specific reasons that constitute excusable neglect, mistake, etc.; it is not enough to mention other conflicts and commitments that in some vague manner might have had an overall adverse effect on counsel's available time and concentration. Plaintiffs' counsel's general difficulties with his work load (which are never quite spelled out) are not grounds for vacating a judgment, especially since the affidavits do not explain precisely how these difficulties affected the particular instances where counsel failed to appear, failed to

comply with Court orders, and failed to make arrangements to remedy his own difficulties in this regard. In any event, it is, at best, disingenuous for the plaintiffs' counsel to suggest that either the defendant or the sheer size of the Hispanic community is responsible for his own derelictions. Moreover, while plaintiffs' counsel's allegedly selfless devotion to the State Assembly's Committee on Social Services is admirable (and $10,000 per annum is hardly a miniscule amount), there are quite a few attorneys in this city who devote themselves to charitable causes (at even less remuneration), and it is respectfully submitted that it would be inappropriate for this Court to conclude that such devotion, however commendable, excuses the kind of neglect and failures that have occurred in this case.

6. Furthermore, as previously indicated, not a single argument that the plaintiffs' attorney is asserting in his affidavits contains anything new. On the afternoon of December 13, 1974, or the last working day prior to the peremptorily-ordered trial date of this action, the plaintiffs' attorney served a "notice of entry" setting forth the argument that he repeats in the present motion papers, namely that he had a prior trial commitment. Therefore, the plaintiffs' attorney's asserted excuse of a previous trial commitment was before this Court on December 16, 1974, and was evidently rejected. Similarly, that "notice of entry" also argued that the

plaintiffs in this action deserved special attention due to their Hispanic background and thus this argument was also implicitly rejected by Judge Bruchhausen. Finally, even the plaintiffs' attorney's scurrilous allegations in the present motion papers accusing your deponent's firm of fraud in the defense of this action are nothing new, since such unfounded allegations had been made prior to December 16, 1974 by the plaintiffs' attorney in an affidavit he submitted in opposition to defendant's motion to dismiss the complaint of plaintiff Jose Mendez Rivera for his wilful failure to appear for an examination before trial. It should also mention in passing that the plaintiffs' attorney appears to still be having his difficulties with Mr. Rivera, since his motion papers do not contain an affidavit by this plaintiff even though his notice of motion refers to one. Similarly, there is no affidavit from plaintiff Gilberto Gerena Valentin, although his affidavit is also referred to. However, since the affidavits submitted by the other three plaintiffs are identical, and were obviously written by the plaintiffs' attorney, your deponent assumes that the missing affidavits of Joseph Mendez Rivera and Gilberto Gerena Valentin would only parrot what the other plaintiffs have already put their signature to.

7. Having thus demonstrated that the instant motion is defective not only on the grounds that it is incredibly untimely, but also on the grounds that it fails to set forth any

considerations or factors that were not before this Court on December 16, 1974, your deponent must now correct several clear misstatements of fact that are contained in the plaintiffs' attorney's motion papers. To begin with, in an attempt to argue that this matter should never have been brought in federal court in the first place, the plaintiffs' attorney has set forth in paragraph 33 of his affidavit that this action lacks a basis for federal subject matter jurisdiction. This assertion is clearly wrong. Contrary to the allegations of the plaintiffs' attorney, this action was not commenced in the first instance in the United States District Court for the District of Puerto Rico. This action was actually commenced in the local Court of Puerto Rico. On June 25, 1973, defendant Pan American's attorneys in Puerto Rico filed a petition for removal of this action to the United States District Court for the District of Puerto Rico, not on the basis of diversity of citizenship as plaintiffs' attorney has alleged, but solely on the basis that federal court jurisdiction of this action existed pursuant to 28 U.S.C. 1331(a) and § 404(b) of the Federal Aviation Act of 1958, 49 U.S.C. 1374(d), in that the complaint in this action accused defendant Pan American of unjust discrimination in air transportation. On July 6, 1973, defendant Pan American moved for a change of venue to the United States District Court for the Eastern District of New York on the grounds that New York was a far more convenient

forum to litigate this action. This motion was granted on the consent of the plaintiffs' attorney in Puerto Rico, and in his papers submitted with reference to that motion it should be noted that the plaintiffs' attorney in Puerto Rico acknowledged that all of the plaintiffs lived in New York City. Therefore, the allegation of lack of subject matter jurisdiction set forth by the plaintiffs' attorney in the instant motion demonstrates this attorney's complete lack of knowledge of the background of this litigation.

8. In paragraph 35 of his affidavit submitted in support of the present motion, and indeed in several other paragraphs of his affidavit, the plaintiffs' attorney has accused your deponent's firm of deliberately attempting to have this Court supervise the examinations before trial of the plaintiffs in order to affect this Court's impartiality at the subsequent trial of this action. The plaintiffs' attorney further alleges that the portions of the plaintiffs' examinations before trial which were held before this Court involved scandalous matter which was not relevant to the merits of the plaintiffs' claim herein. Your deponent is more than willing to admit that the testimony of the plaintiffs before this Court in connection with their examinations before trial must have been embarrassing to them, since such testimony concerned lengthy criminal records. In this regard, it should be noted that the plaintiffs' attorney initially imposed his objections

to the plaintiffs' testifying to certain matters including their criminal records when the examinations before trial of the plaintiffs were commenced on February 20 and 22, 1974, at your deponent's offices. In fact, those examinations before trial could not be completed due to the plaintiffs' attorney's instructions to his clients not to answer these questions. Consequently, your deponent was forced to make a motion to compel the plaintiffs to answer such questions before this Court, and in a Memorandum and Order dated March 14, 1974, this Court granted the motion in its entirety. A copy of this Memorandum and Order is hereto attached as "Exhibit A". Therefore, it is impossible for your deponent to understand how the plaintiffs' attorney can again be arguing that inquiry into the plaintiffs' criminal records is irrelevant to this litigation. Of course, the propriety of such inquiry is underscored by the fact that the complaint in this action affirmatively alleges that all the plaintiffs have "good" reputations. Consequently, since the plaintiffs affirmatively put their reputation in issue in this litigation, your deponent had every right to inquire at the examinations before trial of the plaintiffs as to any factors, such as criminal records, which might tend to negate the allegations of good reputation contained in the complaint.

9. As previously indicated, the plaintiffs' attorney argues that your deponent deliberately attempted to obtain this Court's supervision of the examinations before trial of the

plaintiffs in order to affect the impartiality of this Court. Such an allegation is an insult to one's intelligence. Moreover, this allegation is patently false. As mentioned in the preceding paragraph, after your deponent's initial attempt to conduct the examinations before trial of the plaintiffs in this action was interrupted by the plaintiffs' attorney's direction to his clients not to answer questions involving their criminal records, a motion was made before this Court to direct the plaintiffs to answer such questions, and said motion was granted in all respects. Consequently, if the plaintiffs' attorney had complied with this Court's Memorandum and Order of March 14, 1974, the depositions of the plaintiffs would have been completed at your deponent's offices without further incident. However, during a second attempt to complete the plaintiffs' depositions, the plaintiffs' attorney again interposed the same objections that had been overruled, and it was for this reason that your deponent was compelled to transfer the taking of the depositions to the United States Court House for closer supervision by Judge Bruchhausen. Even then, the depositions were initially reconvened not in Judge Bruchhausen's presence, but in a separate conference room. However, the plaintiffs' attorney continued his wilful failure to comply with this Court's directions and after several appearances before Judge Bruchhausen during which the Court continued to overrule the plaintiffs' objections, Judge Bruchhausen finally directed the depo-

sitions to be completed in his presence. Consequently, it is readily apparent that the only reason that Judge Bruchhausen became personally connected with the completion of the plaintiffs' examinations before trial was the continued refusal of the plaintiffs' attorney to comply with the orders of this Court directing his clients to answer these questions.

10. Your deponent shall now, as briefly as possible, set forth, once again, the history of the dilatory and inexcusable conduct of the plaintiffs and the plaintiffs' attorney in this action which led to defendant Pan American's motion to dismiss this action pursuant to Rule 41(b) of the Federal Rules of Civil Procedure on December 16, 1974, and the granting of such motion by this Court.

11. The difficulty with plaintiffs' attorney commenced at the taking of the plaintiffs' depositions on February 20 and 22, 1974. As recounted earlier, those depositions could not be completed due to the plaintiffs' attorney's continued interruption of your deponent's examination of the five plaintiffs and his direction to them not to answer proper questions relating to the allegations contained in the complaint. Consequently, your deponent prepared and served a motion to compel the plaintiffs to answer these questions, which, as previously indicated, was fully granted by this Court in the Memorandum and Order dated March 14, 1974. Moreover, your deponent's motion was originally made returnable on March 4, 1974, since this

Court had scheduled a pre-trial conference for that date. However, neither the plaintiffs' attorney nor any representative from his office appeared at that pre-trial conference on March 4, 1974. Therefore, your deponent wrote to the plaintiffs' attorney on that date instructing him that his default had been duly noted and that at Judge Bruchhausen's direction defendant Pan American's application would be ruled upon on Monday, March 11, 1974, without oral argument.

12. Following this Court's Memorandum and Order of March 14, 1974, defendant's attorneys then served notices for the continued depositions of the plaintiffs, and these depositions were recommenced on April 11, 1974, at the office of defendant's attorneys. However, the plaintiffs' attorney continued his obstructive tactics, rendering it necessary to transfer the deposition taking to the United States Court House for further reulings by Judge Bruchhausen. After Judge Bruchhausen ruled against him, plaintiffs' attorney continued his obstructive conduct when the depositions were resumed on the afternoon of April 11, 1974, in the United States Court House. Thereafter, at Judge Bruchhausen's direction three of the depositions were completed in the Court's presence during which the objections propounded by plaintiffs' attorney were overruled. In this manner, the depositions of all but one of the plaintiffs were finally completed. However, plaintiff Joseph Mendez Rivera failed to appear in Court on the

afternoon of April 11th, and consequently at the end of the proceedings before Judge Bruchhausen plaintiffs' attorney promised to produce that plaintiff for the continuance of his deposition at your deponent's office at 3:00 p.m. on April 15, 1974. I then instructed the Court Reporter to be at my office at that time on that date for the continued examination of the plaintiff.

13. The Court Reporter arrived in my office on that date, but neither the plaintiffs' attorney nor the plaintiff appeared. When I tried to contact plaintiffs' attorney by telephone his office advised me that his whereabouts were unknown. The default of the appearance of plaintiff Joseph Mendez Rivera was thereupon duly noted at 4:00 p.m.

14. Another pre-trial conference had been scheduled by this Court in this action for 10:00 a.m. on April 17, 1974. However, for the second straight time, neither the plaintiffs' attorney nor any representative from his office appeared at that scheduled conference. In paragraphs 1 through 4 of his affidavit in support of the present motion plaintiffs' attorney makes vague allegations and excuses for his failure to appear at this and other scheduled pre-trial conferences. However, nothing the plaintiffs' attorney says even remotely justifies the fact that on no less than three occasions your deponent appeared in the United States District Court for the Eastern District of New York before Judge Bruchhausen for scheduled

pre-trial conferences, and that on each such occasion the plaintiffs' attorney failed to appear or to offer any excuse for such failure. Following the default on April 17, 1974, your deponent prepared a notice of motion to dismiss the complaint of plaintiff Joseph Mendez Rivera which was made returnable on April 29, 1974.

15. Following the hearing of this motion, this Court by order dated June 3, 1974, directed plaintiff Joseph Mendez Rivera to appear in the United States District Court for the Eastern District of New York for the completion of his deposition on June 13, 1974.

16. On May 30, 1974, your deponent had hand-delivered to the office of plaintiffs' attorney the originals and copies of the transcripts of the depositions of plaintiffs Gilberto Gerena Valentin, Jose Antonio Aponte Vazquez, Jorge B. Flores-Ruiz, and Carlos Reyes. In the letters accompanying the hand-delivered transcripts, it was requested that each plaintiff sign and swear to the original of his deposition and that it be returned to your deponent as soon as possible.

17. On June 13, 1974, in response to the order of this Court, the deposition of plaintiff Joseph Mendez Rivera was finally completed in open court.

18. On July 9, 1974, I again wrote to the plaintiffs' attorney requesting the return of the original transcripts of the depositions delivered to him on May 30th. With

that letter I also had hand-delivered to plaintiffs' attorney the original and one copy of the transcript of the deposition of plaintiff Joseph Mendez Rivera taken on February 22, 1974, and the original and one copy of the transcript of his deposition taken before this Court on June 13, 1974.

19. On October 25, 1974, your deponent appeared for a scheduled pre-trial conference before this Court to discover for the third time that plaintiffs' counsel failed to appear. Instead, a representative who was not an attorney appeared on behalf of his office and stated that the plaintiffs' attorney had a prior commitment on that date.

20. Judge Bruchhausen at that time set this case down for trial on December 4, 1974. The plaintiffs' attorney was informed of this trial date by a letter from Judge Bruchhausen dated October 29, 1974, which letter admonished plaintiffs' attorney for his failure to give prior notice of his intention not to appear for the pre-trial conference on October 25th. A copy of this Court's Memorandum dated October 29, 1974 is attached hereto as "Exhibit B".

21. By November 19, 1974, defendant's attorneys had not received from the plaintiffs' attorney any of the original transcripts of the depositions of the five plaintiffs nor had plaintiffs' attorney communicated with my office concerning his delay in responding to the requests for their return. Consequently, on that date I wrote to him demanding

the return of all the original transcripts unsigned, without any changes whatsoever, so that they could be presented to this Court at the trial of this action in the form signed and certified to by the stenographic reporter, in accordance with Rule 30(e) of the Federal Rules of Civil Procedure.

22. Thereafter, my office and I made extensive preparations for the trial scheduled for December 4, 1974, including arranging for the production of witnesses who would testify at the trial. These witnesses included a stewardess who was based in Honolulu, a station manager based in Puerto Rico, and the captain of the aircraft involved in the incident alleged in the complaint. In the meantime, I kept in touch with this Court in order to be certain as to whether the trial would proceed as scheduled on December 4, 1974.

23. On November 22, 1974, the Court's law clerk advised my office that it was not possible for this trial to proceed on December 4, 1974, but that there appeared to be no conflict in the Judge's schedule for December 16, 1974. Consequently, on November 22, 1974, I wrote to Judge Bruchhausen informing him that the date of December 16, 1974 was acceptable from the standpoint of Pan American and in that letter I emphasized the great difficulty that Pan American would have if the trial of this action might be rescheduled through any last minute request of plaintiffs' attorney. A copy of this letter was sent to plaintiffs' attorney. Thereafter, on November 26,

1974, this Court mailed memorandum notices to the attorneys for both sides advising that the trial date of this action had been rescheduled from December 4 to December 16, 1974. This memorandum stated that:

> "It is expected that both sides will be prepared to proceed to trial on December 16, 1974."

A copy of this Court's memorandum dated November 26, 1974, is hereto attached as "Exhibit C".

24. In view of the foregoing declaration, I continued with final preparations for trial. However, since the original transcripts of the depositions of the plaintiffs had still not been returned, despite my letter demand to plaintiffs' attorney, a motion was served upon him to compel him to return the transcripts of the depositions of the plaintiffs to defendant's attorneys forthwith. This motion was served on plaintiffs' attorney on December 2, 1974, and was made returnable on December 9, 1974. It should be noted that copies of these motion papers were personally served upon the plaintiffs' attorney and he acknowledged such receipt thereof with an admission of service in his own handwriting on the original and on deponent's office copy of the motion papers.

25. On December 9, 1974, I appeared before Judge Bruchhausen to argue this motion. However, once again, plaintiffs' attorney did not appear in Court to oppose the motion and a default was noted. At the Court's direction an order was

prepared which directed the plaintiffs' attorney to deliver the transcripts to Judge Bruchhausen's chambers no later than forty-eight (48) hours after service of a copy of this order upon him. This order also decreed that the case was peremptorily set down for trial at 10:00 a.m. on December 16, 1974. A copy of said order with notice of entry was personally served upon plaintiffs' attorney's office at 4:06 p.m. on December 9, 1974. Copies thereof are attached hereto as "Exhibit D". Nevertheless, the depositions were not delivered to Judge Bruchhausen's chambers within the time period set forth in that order nor at any time thereafter.

26. The plaintiffs' attorney is now arguing that Judge Bruchhausen exceeded his authority in peremptorily decreeing December 16, 1974 as the trial date of this action at the hearing on December 9th. The plaintiffs' attorney clearly has no standing to assert such an objection, especially at this late date, since he deliberately failed to appear at the hearing on December 9th and at the three previous scheduled pre-trial conferences.

27. From the preceding paragraphs it is patently evident that the history of this litigation is replete with examples of dilatory, obstructive, and contemptuous conduct on the part of the plaintiffs and their attorney, not only to defendant and its attorneys, but, far more importantly, to the Court itself. Finally, as this Court is well aware, on

December 16, 1974, the peremptorily ordered trial date for this action, neither the plaintiffs' attorney nor the plaintiffs appeared for trial. On the other hand, defendant's attorneys appeared on that date with defendant's witnesses, including the stewardess from Honolulu and the station manager from Puerto Rico. The Court was duly convened and the case was called for trial. Judge Bruchhausen, in his opening comments announced that the trial would proceed as peremptorily ordered. Defendant's counsel stated that defendant was ready for trial. The Court then said:

> "THE COURT: I don't see the plaintiffs' attorney or any of his witnesses here, although this is the day that the case was scheduled peremptorily for trial."

A copy of the proceedings before Judge Bruchhausen on that day is hereto collectively annexed as "Exhibit E". The obvious reason why Judge Bruchhausen was not persuaded by the excuses set forth in the plaintiffs' attorney's "notice of entry" of December 13, 1974, is that the plaintiffs' attorney had been on notice for <u>over one and one half months</u> that this matter was scheduled for trial and in that time he completely failed to communicate to this Court any problems he may have had with the scheduled trial dates. Following Judge Bruchhausen's opening statements on December 16, 1974, your deponent, with the Judge's permission, proceeded to move in open Court for dismissal of this action for lack of prosecution pursuant to Rule 41(b).

Judge Bruchhausen granted the application and directed defendant to prepare an appropriate decree. A copy of this judgment, signed by Judge Bruchhausen on December 19, 1974, is hereto annexed as "Exhibit F". The Court similarly directed defendant to prepare findings of fact and conclusions of law, which were also signed by Judge Bruchhausen on December 19, 1974. A copy of these findings of fact and conclusions of law are hereto annexed as "Exhibit G". Copies of the judgment and the findings of fact and conclusions of law, with notice of entry, were served by hand on the plaintiffs' attorney on the same day they were signed by Judge Bruchhausen, to wit, December 19, 1974.

28. As previously indicated, the plaintiffs' attorney's present application to set aside Judge Bruchhausen's judgment of December 19, 1974, contains nothing more than a reassertion of the same old arguments and excuses. Consequently, since this Court evidently found these excuses unacceptable on December 16, 1974, it should find them even more unacceptable one year later.

For all of the foregoing reasons, it is respectfully submitted that the plaintiffs' application to set aside this Court's judgment of December 19, 1974, and for other relief should be in all respects denied.

Sworn to before me this
17th day of December, 1975.

William J. Junkerman

2041-1201
WJJ
CED
RRC
WFM

EXHIBT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILE COPY
HAIGHT, GARDNER, POOR & HAVENS
ONE STATE STREET PLAZA NEW YORK
3/15/74
ENTERED
BY: RE SGM

GILBERTO GERENA VALENTIN, et al.,

Plaintiffs,

-against- : No. 73 C 1552

PAN AMERICAN WORLD AIRWAYS, INC., and EDWIN H. GLASSER, : March 14, 1974

Defendants.

Appearances: LORENZO F. PADILLA, ESQ.
Attorney for Plaintiffs

HAIGHT, GARDNER, POOR & HAVENS, ESQS.
Attorneys for Defendant
Pan American World Airways, Inc.

MEMORANDUM and ORDER

BRUCHHAUSEN, D. J.

The defendant, Pan American World Airways, Inc., moves for an order, compelling the named plaintiffs to answer certain questions, propounded by the defendant.

This is an action for malicious prosecution wherein the plaintiff claims damages in the sum of $1,500,000.00, arising out of an incident aboard one of

EXHIBIT A

defendant's aircraft, at San Juan, Puerto Rico.

Subsequently, oral depositions of all of the plaintiffs were taken. However, they were not concluded because counsel for the plaintiffs instructed his clients not to answer certain questions. Rulings on the objections were reserved for the Court.

Prior to the taking of the deposition, the usual stipulation between the attorneys was entered into which stated:

> "It is further stipulated and agreed that all objections, except as to the form of th. question, shall be reserved to the time of the trial."

This stipulation is to protect the rights of litigants at the time of trial.

Rule 26(b)(1) of the Federal Rules of Civil Procedure sets the scope for all discovery.

> "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, ***. It is not ground for objection

FFI MI—4-6-71-70M 4157

> that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

It is well settled that the federal discovery rules must be liberally construed so as to provide both sides with information essential to proper litigation on all of the facts. Hickman v. Taylor, 329 U.S. 495. This view was reaffirmed by the Supreme Court in United States v. Proctor & Gamble Co., 356 U.S. 677.

In cases wherein damages are sought for loss of reputation, such as defamation and malicious prosecution, inquiries as related to matters of reputation are proper. Patton v. Southern Bell Telephone & Telegraph Company, 38 F.R.D. 428.

The Court has reviewed the objections in the depositions supplied, arguments, together with the applicable law, and concludes that the objections be overruled. The plaintiffs are directed to respond to all the questions propounded.

It is so ordered.

The depositions may be picked up in Chambers, by a messenger.

Copies hereof are being forwarded to the attorneys for each party.

Walter Bruchhausen
Senior U. S. D. J.

EXHIBIT B

2041-1201
5 cen
awdj

UNITED STATES DISTRICT COURT

Memorandum

TO : Lorenzo F. Padilla, Esq. DATE: October 29, 1974

FROM : Senior Judge Bruchhausen

SUBJECT: The action of Valentin et al. v. Pan Am et al.
No. 73 C 1552

In reply to your letter, dated October 24, 1974, received by this Court on October 26, 1974, seeking an adjournment of the conference, scheduled for October 25, 1974, you are informed that on October 25, 1974 your representative, a young lady, and your adversary attended the conference and, after discussion, the action was adjourned to December 4, 1974 at 10 A.M. for trial.

You do not indicate in your said letter that you forwarded a copy thereof to your adversary, in accordance with the usual practice.

/s/ WALTER BRUCHHAUSEN
Senior U. S. D. J.

cc: Messrs. Haight, Gardner,
Poor & Havens

EXHIBIT B

EXHIBIT C

OPTIONAL FORM NO. 10
5010-104

UNITED STATES GOVERNMENT

Memorandum

TO : Haight, Gardner, Poor & Havens
Lorenzo Padilla

DATE: November 26, 1974

FROM : Hon. W. Bruchhausen

2041-1201

SUBJECT: 73 C 1552 Valentin vs. Pan American

Please be advised that due to prior trial commitments it will be necessary to reschedule the above trial date to December 16, 1974 instead of December 4, 1974. It is expected that both sides will be prepared to proceed to trial on December 16, 1974.

WALTER BRUCHHAUSEN, D.J.
by: F.M. Pellegrino
F.M/ Pellegrino, law clerk

A-190

EXHIBIT C

EXHIBIT D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

* *X

GILBERTO GERENA VALENTIN, et al., :

Plaintiffs, : NOTICE OF ENTRY

-against- : 73 C 1552

PAN AMERICAN WORLD AIRWAYS and :
EDWIN H. GLASSER, :

Defendants. :

* *X

S I R :

PLEASE TAKE NOTICE that an order of which the within is a copy, was this day duly entered and filed in the within entitled action in the office of the Clerk of the United States District Court for the Eastern District of New York.

Dated: New York, N. Y.
December 9, 1974

Yours, etc.,

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant
PAN AMERICAN WORLD AIRWAYS, INC.
1 State Street Plaza
New York, N. Y. 10004
212-344-6800

TO: LORENZO F. PADILLA, ESQ.
Attorney for Plaintiffs
277 Broadway
New York, N. Y. 10007

EXHIBIT D

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

* *X

GILBERTO GERENA VALENTIN; JOSE ANTONIO APONTE VAZQUEZ; GEORGE B. FLORES RUIZ; CARLOS REYES LOPEZ and JOSEPH MENDEZ RIVERA,

Plaintiffs,

-against-

PAN AMERICAN WORLD AIRWAYS and EDWIN H. GLASSER,

Defendants.

* *X

ORDER

73 C 1552

The defendant, PAN AMERICAN WORLD AIRWAYS, INC., having moved this Court for an Order pursuant to Rule 30 (e) of the Federal Rules of Civil Procedure directing plaintiffs' attorney to return to the attorneys for defendant PAN AMERICAN WORLD AIRWAYS, INC. the original transcripts of the depositions of all of the plaintiffs in the above-captioned action, whether signed or unsigned, on the date specified for the hearing of this motion, to wit, December 9, 1974,

NOW, upon reading and filing defendant's Notice of Motion dated December 2, 1974 and the affidavit of William J. Junkerman, sworn to the 2nd day of December, 1974 together with the Exhibits thereto annexed with due proof of service thereof endorsed by the attorney for the plaintiffs on the cover of the original thereof and after hearing HAIGHT, GARDNER, POOR &

HAVENS, attorneys for the defendant PAN AMERICAN WORLD AIRWAYS, INC. in support of such motion and no one appearing in opposition thereto and due deliberation having been had thereon, it is

ORDERED that defendant, PAN AMERICAN WORLD AIRWAYS, INC's motion be in all respects granted; and it is further

ORDERED that plaintiffs' attorney is hereby directed to deliver to this Court forthwith, and in no case later than 48 hours after receipt of a copy of this order, the original transcripts of the depositions of GILBERTO GERENA VALENTIN, JOSE ANTONIO APONTE VAZQUEZ, GEORGE B. FLORES RUIZ and CARLOS REYES LOPEZ, which were delivered to him on May 30, 1974 and the original transcripts of the deposition of the plaintiff JOSEPH MENDEZ RIVERA which were delivered to him on July 9, 1974, and it is further

ORDERED, that in view of the prior notice issued by this Court with respect to the trial of this action, this Court peremptorily orders and decrees that the trial of this action will commence at 10:00 A.M. on December 16, 1974 before the HONORABLE WALTER BRUCHHAUSEN in Courtroom No. 3, in the United States Courthouse, 225 Cadman Plaza, Borough of Brooklyn, County of Kings, City and State of New York.

Dated: Brooklyn, N. Y.
December 9, 1974

Senior U.S.D.J.

AFFIDAVIT OF SERVICE OF PERSON IN CHARGE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOHN G. GRIEDER, being duly sworn, deposes and says; that he is over 21 years of age, and a resident of Paterson, New Jersey. That on the 9th day of December, 1974, at 4:50 P.M. he served a true copy of the within Order with Notice of Entry on LORENZO F. PADILLA, ESQ., by delivering to and leaving same with LOUIS ROSEN, an attorney, a proper person in charge of said office, at Room 806 - 810, 277 Broadway, in the Borough of Manhattan, City of New York, between the usual business hours of said day.

John G. Grieder

Sworn to before me this
9th day of December, 1974.

Notary Public

EXHIBIT E

SAID EXHIBIT ALREADY INCLUDED

IN APPENDIX AT A-21 -- STENOGRAPHIC

TRANSCRIPT OF INQUEST HELD ON

DECEMBER 16, 1976.

EXHIBIT F

SAID EXHIBIT ALREADY INCLUDED IN

APPENDIX AT A-51 -- JUDGMENT --

EXHIBIT G

SAID EXHIBIT ALREADY INCLUDED IN

APPENDIX AT A-54 -- FINDINGS OF

FACT AND CONCLUSIONS OF LAW

MEMORANDUM OF LAW IN OPPOSITION

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

. x

GILBERTO GERENA VALENTIN, et al., :

73 C 1552 WB

Plaintiffs, :

-against- :

PAN AMERICAN WORLD AIRWAYS, INC. :
EDWIN GLASSER,

:

Defendants.

. x

MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS' MOTION TO SET ASIDE JUDGMENT

STATEMENT

The facts of this matter are set forth at length in the accompanying affidavit of William J. Junkerman in opposition to this motion. They demonstrate that plaintiffs' prosecution of this action was marked by unreasonable procrastination and disregard of the attempts by the defendant and by this Court to complete the discovery process and to proceed to a trial of plaintiffs' claims. Furthermore, the plaintiffs and the plaintiffs' attorney failed to avail themselves of the opportunity to present their case by failing to appear for

the scheduled trial even though they were given clear and timely notice of its time and place. This memorandum demonstrates that these failures constituded, inter alia, failure of prosecution justifying the dismissal with prejudice of the plaintiffs' action on the merits and the award to the defendant of the costs of preparing for the scheduled trial of this action.

In addition, this memorandum demonstrates that the plaintiffs' present motion does not fulfill the requirements of Rule 60(b). In particular, the plaintiffs and their attorney have not demonstrated that their failure to prosecute this action was the result of mistake, inadvertence, surprise, or excusable neglect as those terms are used in Rule 60(b)(1). Furthermore, the allegations of fraud, which are untrue, are unsupported by the requisite clear and convincing evidence. The plaintiffs and their counsel have also failed to demonstrate that the claim affected by the judgment in question is a meritorious claim. Moreover, the plaintiffs' motion herein is untimely in that it was not brought within a reasonable time as required by Rule 60(b).

As will be demonstrated below, each of these reasons is in itself a sufficient basis for the denial of plaintiffs' motion to set aside the judgment in question. If the plaintiffs are due any remedy in this situation, it is against their attorney, not the defendant.

POINT I

THE FAILURES OF THE PLAINTIFFS' ATTORNEY, INCLUDING THE FAILURE TO APPEAR FOR THE SCHEDULED TRIAL OF THIS ACTION, CONSTITUTES INTER ALIA, FAILURE OF PROSECUTION UNDER FRCP 41(b) AND CALENDAR RULE 8.

Perhaps the leading decision dealing with dismissal of a plaintiff's action under similar circumstances is Schwarz v. United States, 384 F.2d 833 (2d Cir. 1967). The plaintiff's attorney in that case was aware of the scheduled trial date but, on the preceding afternoon, sought to obtain an adjournment because other trials were preventing him from trying that case. On the scheduled trial date, an explanation of the situation was made, but the defendant moved for dismissal under Fed. R. Civ. P. 41(b). The District Court granted the motion

to dismiss with prejudice and, on a motion for re-argument, stated its analysis of the situation as follows:

> We are completely satisfied that the plaintiff's case was never prepared for trial and that counsel for the plaintiff never had any intentions to try it on the day that was set and agreed to on December 27, 1966, i.e., January 20, 1967.

quoted in 384 F.2d at 835.

Noting that "a dismissal with prejudice for failure to prosecute will not be reversed except for abuse of discretion," the United States Court of Appeals for the Second Circuit affirmed the dismissal. Pertinent here are the following excerpts from the decision:

> It is hard to see how plaintiff can contend that it was an abuse of discretion for Judge Murphy to rule that the circumstances set out above showed inexcusable neglect, especially in light of the fact that it must have become apparent to plaintiff's counsel well in advance of January 19 that they could not proceed to trial on the 20th. Yet they waited until the 19th, the eve of the trial date, before attempting to advise the court of that fact.
>
> We have found no case of reversal by an appellate court of a District Court's exercise of discretion in circumstances such as these. . . .

> . . . .
>
> Plaintiff's counsel alleged that they intended to try the case on the day set, but are able to point to no support in the record for this claim. No steps taken to get ready are shown. . . .
>
> Unfortunately, it may be that plaintiff has a meritorious cause of action and will be denied his day in court. This does not, however, require reversal. Link v. Wabash Railroad Co., supra. As the Supreme Court pointed out in footnote 10 in the opinion in Link, if the attorney's conduct was substantially below what is reasonable under the circumstances, the client's remedy is a suit for malpractice. If the trial court's commendable efforts to move business on its calendars are ever to succeed, they must be supported. A client damaged by such neglect has his remedy against counsel. Here plaintiff's attorney apparently took on more cases than he could reasonably well handle, thoroughly neglected this one, let years go by and then, having reached a place on the trial calendar, ignored his responsibility either to prepare for trial or make timely arrangements otherwise.

384 F.2d at 835-36.

The Court of Appeals concluded by reminding the District Court of the possibility of imposing substantial costs and attorney's fees instead of dismissing actions for inexcusable neglect, but the Court of Appeals indicated that the choice of remedies was up to the District Court.

Another Second Circuit decision relevant here is Maiorani v. Kawaskaki Kisen K. K. Kobe, 425 F.2d 1162 (2d Cir.), cert. denied, 339 U.S. 910 (1970), where plaintiff's attorney was aware of the scheduled trial date but was not available when called to appear at a certain time that day. Even though the plaintiff's attorney was out of town taking a deposition, the District Court dismissed the action for failure to prosecute. The Court of Appeals affirmed this dismissal, pointing out that the attorney had not requested an adjournment until it was too late. The court went on to make the following observation about cases that have progressed to the trial stage:

> When a case has reached this stage, counsel cannot make himself unavailable, even temporarily, without providing a stand-by, as the trial judge thought he in fact had done. Opposing counsel, their witnesses, and parties to other cases awaiting trial have rights too, and the client is not without a remedy.

425 F.2d at 1163.

Similarly, in Garden Homes, Inc. v. Mason, 249 F.2d 71 (1st Cir. 1957), cert. denied, 356 U.S. 903 (1958), the plaintiff's attorney failed to appear on the scheduled trial date because of a

conflicting court appearance. Here, too, the district court dismissed plaintiff's action with prejudice, and the dismissal was upheld on appeal. The Court of Appeals noted that there had been other instances where the plaintiff's attorney had not diligently prosecuted the case and that, under the circumstances, the district court did not abuse its discretion by dismissing the action.

> On the afternoon of March 6, the clerk received a letter from Angus M. MacNeil stating that he could not be present at the trial on Wednesday morning, March 6, in Concord because he would be appearing before the Supreme Judicial Court of Massachusetts. On March 14, the district court entered the formal judgment of dismissal from which this appeal is taken.
>
> Under the circumstances, considering also other instances in the case of failure diligently to prosecute, as pointed out by appellee, we cannot say that the district court abused its discretion in dismissing the complaint.

249 F.2d at 72.

And in Sheaffer v. Warehouse Employees Union, 408 F.2d 204 (D.C. Cir.), cert. denied, 395 U.S. 935 (1969), the District of Columbia Court of Appeals also pointed out that a trial judge is entitled to consider the entire procedural history of a case in deciding whether to dismiss a plaintiff's action for

failure of prosecution. Sheaffer dealt with delay rather than failure to appear at trial, but the holding is certainly applicable here in view of plaintiffs' attorneys other failures to diligently prosecute this case.

> Upon inspection of all the pleadings we find that this case was handled in an extremely dilatory fashion. The record reflects numerous violations of our local court rules and pre-trial orders, and a complete lack of diligence in bringing the case to trial as evidenced by the continually tardy filing of the appropriate motions and papers. . . .
>
> What requires emphasis here is the plain fact that appellants have not complied with the rules of the District Court which were promulgated with a view toward increasing judicial efficiency. Congested court dockets, vexatious to all litigants, are the direct result of lax implementation and enforcement of court rules.

408 F.2d at 205.

Thus, there can be no question but that, in view of the situation facing this Court, it has the discretion under Fed. R. Civ. P. 41(b) to dismiss plaintiffs' action herein for failure to prosecute. This discretionary right, as well as the right to award reasonable costs in addition, is also set forth in Rule 8 of this Court's Calendar Rules. It is respectfully submitted that the circumstances of this

case call for this Court to exercise its discretion by dismissing plaintiffs' action and awarding reasonable costs, including attorney's fees, to defendant.

POINT II

PLAINTIFFS' MOTION DOES NOT FULFILL THE REQUIREMENTS OF RULE 60(b)

Upon the entry of a judgment, a party has thirty day s within which to appeal by simply serving and filing a notice of appeal. Fed. R. App. P. 3 & 4. No such notice of appeal was served or filed. Instead, almost a full year following entry of the judgment in question, plaintiffs are moving for the extraordinary relief provided in certain limited situations by Fed. R. Civ. P. 60(b). In doing so the plaintiffs' counsel and three of the plaintiffs have submitted affidavits that purport to explain and justify their failure to prosecute this action in accordance with this Court's orders and the Federal Rules of Civil Procedure. It is respectfully submitted that, on the basis of the decisional law set forth below, the plaintiffs and their counsel have not made a showing sufficient to justify the

relief that they seek.

Plaintiffs' motion is based upon Fed. R. Civ. P. 60(b), which provides, in pertinent part, as follows:

> "(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

Based upon their affidavits, it appears that the plaintiffs and their counsel are seeking relief specifically on the basis of the reasons set forth in Fed. R. Civ. P. 60(b)(1) and 60(b)(3).

It should initially be emphasized that ". . . Rule 60(b) provides for extraordinary relief and may only be invoked upon a showing of exceptional circumstances." John F. Smith's Sons Co. v. Lattimer Foundry & Mach. Co., 239 F.2d 815, 817 (3d Cir. 1956). See Rinieri v. News Syndicate Co., 385 F.2d 818, 822 (2d Cir. 1967); Torockio v. Chamberlain Mfg. Co., 56 F.R.D.82, 86-87 (W.D. Pa. 1972), aff'd without opinion, 474 F.2d 1340 (3d Cir. 1973); Geigel v. Sea Land Service, Inc., 44 F.R.D. 1 (D.P.R. 1968).

As demonstrated in the accompanying affidavit of William J. Junkerman, the plaintiffs and their attorney cannot accurately claim that requisite exceptional circumstances exist in this case. The only relevant exceptional aspect of this case has been the flagrant disregard by the plaintiffs and their attorney of this court's orders and the Federal Rules of Civil Procedure. Even if the circumstances described in the affidavits submitted in support of plaintiffs' motion were considered to be exceptional, the plaintiffs and their attorney have still not demonstrated the actual direct

connection between any such circumstances and their failure to prosecute this particular action. Moreover, these affidavits also make no explanation of the reasons why a simple notice of appeal was not served and filed within thirty days following the judgment in question. Furthermore, there is no indication in these affidavits that the plaintiffs and their counsel could not have made arrangements that would have permitted them to prosecute this action in a proper fashion.

In other words, notwithstanding any alleged exceptional circumstances, the affidavits of the plaintiffs and their attorney do not demonstrate mistakes, inadvertence, surprise, or excusable neglect as those terms are used in Rule 60(b)(1). Under that rule, the moving party must articulate the specific reasons that constitute excusable neglect, etc.; it is not enough to mention other conflicts and commitments that in some vague manner might have had an overall adverse effect on counsel's available time and concentration. See Ledwith v. Storkan, 2 F.R.D. 539, 542 (D. Neb. 1942), which discusses numerous decisions dealing with this issue.

Plaintiffs' counsel's general difficulties with his work load (which are never quite spelled out) are not grounds for vacating a judgment, expecially since the affidavits do not explain precisely how these difficulties affected the particular instances where counsel failed to appear, failed to comply with court orders, and failed to make arrangements to remedy his own difficulties in this regard. See Dolphin Plumbing Co. of Florida v. Financial Corp. of North America, 508 F.2d 1326 (5th Cir. 1975). In this connection, reference should be made to Fed. R. Civ. P. 9(b) which requires that any allegations of "mistake" by plaintiffs or their counsel must be set forth in their affidavits with particularity. See United States v. $3,216.59 in United States Currency, 41 F.R.D. 433 (D. S.C. 1967).

Plaintiffs' counsel goes to great, but irrelevant, lengths in an attempt to explain away his clear derelictions as excusable neglect. It is, however, well established that carelessness and disregard or ignorance of the Federal Rules of Civil Procedure are not the sort of "excusable neglect" contemplated by Rule 60(b) as a ground for

vacating adverse judgments, and the Court of Appeals for the Second Circuit has so ruled. For example, in Ohliger v. United States, 308 F.2d 667 (2d Cir. 1962), plaintiff-appellant filed suit against the United States on January 9, 1959. After issue was joined, the defendant submitted interrogatories to the plaintiff. Plaintiff, after appearing at a Review Call on December 8, 1960, was ordered to complete discovery and to place the case on the trial calendar within six months. On June 19, 1961, with defendant's interrogatories to the plaintiff still unanswered, an order was entered dismissing the plaintiff's claim for lack of prosecution. More than four months thereafter, plaintiff moved to set aside the judgment. The motion was denied and the plaintiff appealed. Plaintiff's counsel attempted to justify his failure to prosecute his claim by pleading ignorance of the Court's procedural rules. The Court wrote:

> . . . Surely this is not the sort of 'excusable neglect' contemplated by Federal Civil Rule 60(b), 28 U.S.C.A. as ground for vacating an adverse judgment. Counsel's carelessness cannot be excused by this Court if it is to perform its obligation to other litigants whose cases are necessarily delayed by such conduct. Judge Ryan's

> order under Rule 60(b) should be overturned only if there is a clear abuse of discretion, and none has been shown. We agree with the court below that 'efficient judicial administration dictates that the relief sought must be denied'.

308 F.2d at 667-668 (emphasis supplied). Accord, United States v. Erdoss, 440 F. 2d 1221 (2d Cir.) cert. denied, 404 U.S. 849 (1971). See Hoffman v. Celebreeze, 405 F.2d 833, 835 (8th Cir. 1969); In re Wright, 247 F. Supp. 648, 659 (E.D. Mo. 1965); Geigel v. Sea Land Service, Inc., 44 F.R.D. 1 (D.P.R. 1968).

Similarly, the Second Circuit has also held that the failure of plaintiffs counsel to comply with pre-trial orders as well as to attend a motion hearing constituted inexcusable neglect. Hines v. Seaboard Air Line R., 341 F.2d 229 (2d Cir. 1965). To the same effect is Nederlandsche Handel-Maatschappig, N.V. v. Jay Emm, Inc., 301 F2d 114 (2d Cir. 1962), which upheld the denial of plaintiffs motion pursuant to Rule 60(b) to set aside a default judgment entered as a result of plaintiffs' counsel's failure to appear for trial. See Martella v. Marine Cooks & Stewards Union, Etc., 448 F.2d 729 (9th Cir. 1971).

Particularly appropriate here is the following language from Williams v. Five Platters, Inc., 510 F.2d 963, 964 (C.C.P.A. 1975):

> The reasons given by counsel are such as to evidence neglect but not excusable neglect. Absence from one's office and pressure of work are common phenomena. Lawyers who sit constantly in their offices with little to do are unlikely to be dealing with Rule 60(b)(1). . . .

Plaintiffs' counsel further seeks to obscure the fact of his own failures by making untruthful and unsupported allegations that defendants' counsel have been guilty of fraud. These amorphous but extremely serious allegations, accompanied by plaintiffs' counsel's vague references to "the pettifoggery of the defendants attorneys", not only distort the facts that formed the basis for the judgment below but also are insufficient as a matter of law to allege fraud [see Fed. R. Civ. P. 9 (b)], much less to demonstrate its presence. The law is settled that fraud must be demonstrated by clear and convincing evidence.

Although plaintiffs' counsel initially characterizes the alleged fraud of defendants'

counsel as both extrinsic and intrinsic, an examination of his affidavit reveals that he is, in effect, alleging primarily a fraud upon the court. The Second Circuit had the opportunity to consider the question of fraud upon the court in Mastini v. American Telephone & Telegraph Co., 369 F.2d 378 (2d Cir. 1966). There the plaintiff appealed from a denial of his motion under F.R.C.P. 60(b) for relief of a summary judgment for defendant holding that plaintiff's patent on a mobile radio-telephone system had not been infringed. His motion was made nearly a year after the granting of summary judgment, and he alleged fraud on the part of defendant's attorney. The Court wrote:

> . . . In this Court, appellant asserts only the single ground that 'the defendants have improperly influenced this Court in its decision by a preordinated, cunning, unconscionable plan or scheme of defense based upon a great deal of misrepresentations and misconducts.' Chief Judge Ryan found that appellant was attempting to use a Rule 60 motion to relitigate the merits of his claim and that the allegations of fraud would not substantiate it. We agree.
>
> Affirmed.

369 F.2d at 379. See Kupferman v. Consolidated

Research & Mfg. Corp., 459 F.2d 1072(2d Cir. 1972)

Thus, it is clear that vague allegations of fraud are insufficient to support a 60(b) motion; rather, such fraud must be shown by clear and convincing evidence. DiVito v. Fidelity & Deposit Co. of Maryland, 361 F.2d 936 (7th Cir. 1966); Nederlandsche Handel-Maatschappij, N.V. v. Jay Emm, Inc., 301 F.2d 114 (2d Cir. 1962); Assmann v. Flemming, 159 F.2d 332 (8th Cir. 1947). Plaintiffs' counsel's allegations of fraud and pettifoggery are not only untrue but, even if true, would be clearly insufficient as a matter of law since they fall far short of the showing of clear and convincing evidence that the law requires.

In making a Rule 60(b) motion, a party must, in addition to the other requirements set forth therein, also demonstrate that the claim affected by the judgment in question is a meritorious claim. See, e.g., Bratnober v. Illinois Farm Supply Co., 169 F. Supp. 85, 89 (D. Minn. 1958); de Chabert v. Wheatley, 392 F. Supp. 62, 63 (D. St. Croix 1975). That requirement has not been fulfilled by the plaintiffs in this case. Indeed, on this point, too,

the affidavits are conclusory and argumentative, and they fail to overcome the facts revealed by the record of this case, particularly the depositions of the plaintiffs that were witnessed by this Court. Cf. Beshear v. Weinzapfel, 474 F.2d 127, 132-33 (7th Cir. 1973).

At this point, it should be stressed that plaintiffs' counsel is seeking to vacate this judgment nearly one year after it was rendered. While F.R.C.P. 60(b)(1)§(3) provide, inter alia, that such motions based upon mistake, inadvertence, surprise, excusable neglect, or fraud must be brought no later than one year after the judgment was entered, this one year limitation merely provides the outside limit. That is, Section 60(b) also requires that such a motion be brought within a reasonable time, which may, according to the circumstances of each individual case, be deemed to be a period of less than one year.

In Mayfair Extension, Inc. v. Magee, 241 F.2d 453 (D.C. Cir. 1957), defendant appealed from an order denying his motion to vacate a default judgment. A motion, however, was not brought, as is

the case here, until nearly a year had passed from the time the defendant was fully advised of the default judgment. In affirming the order of denial of the Court below, the Court of Appeals wrote:

> Appellant says its motion is premised on a breach of trust by attorney against client and therefore falls within Rule 60(b)(3), Fed.R. Civ.P. Under this rule a default judgment may be set aside for 'fraud * * *, misrepresentation, or other misconduct of an adverse party.' Appellant argues that a motion to vacate for such reason may be brought any time within one year. But the rule requires that 'The motion shall be made within a reasonable time, and [when based upon Rule 60(b)(3)] not more than one year after the [default] judgment * * *.' Thus it was not only necessary that the motion be filed within one year, but also that it be filed within a reasonable time within the one-year period. Upon the record before us, the latter requirement is not satisfied.

241 F.2d at 454.

The double exigency of Rule 60(b) was also pointed out in Rhodes v. Houston, 258 F. Supp. 546 (D. Neb. 1966), aff'd, 418 F.2d 1309 (8th Cir. 1969), cert. denied, 397 U.S. 1049 (1970). Plaintiff moved to vacate the judgments previously rendered against him in three district court

decisions. In passing upon the requirements of Rule 60(b), the Court wrote:

> . . . The rule, therefore, imposes a twofold time limitation upon resort under it to any one or more of its reasons numbered (1), (2), and (3). Those limitations are, first, that the motion on those three grounds, or any one or more of them, must be 'made within a reasonable time' and, secondly, that it must be made, in any event, 'not more than one year after the judgment, order, or proceeding was entered or taken.' And that restriction has consistently been held to bar the allowance of relief for any one or more of those three reasons, either if the motion for such relief be filed more than one year after the entry of the order or judgment by it assailed, or if it be filed at any time after such entry which, in the circumstances of the case, is not reasonable, even though that interval be less than one year.

258 F. Supp. at 558 (emphasis supplied).

Closer to home, in Robinson v. E.P. Dutton & Co., 45 F.R.D. 360 (S.D.N.Y. 1968), plaintiff moved pursuant to Rule 60(b)(1) to vacate an order of discontinuance that had been entered in a copyright infringement action. However, the motion was not brought until ten months after the date of the discontinuance of the action. Plaintiff had originally agreed to a settlement, but later had

demanded that a new term be added to the settlement. The Court, however, was persuaded by the fact that plaintiff, with full knowledge of the discontinuance, had waited ten months before moving to vacate it:

> This motion was made ten months after the entry of the stipulation of discontinuance. Plaintiff knew every moment of this long period that his action had been discontinued. He consulted with several outside attorneys about the settlement and his rights. Yet he never moved to set aside the judgment until now. It is no excuse to cite his correspondence with his retained counsel. We find that the delay of ten months is unreasonable and inexcusable. Cucurillo v. Schulte, Bruns Schiff Gesellschaft, M.B.H., 324 F.2d 234 (2d Cir. 1963) (eight month delay inexcusable); Ohliger v. United States, 308 F.2d 667 (2d Cir. 1962) (four month delay inexcusable); McCullough v. Walker Livestock Inc., 220 F. Supp. 790 (W.D. Ark. 1963) (two month, ten day delay inexcusable).

45 F.R.D. at 362. It is important to note that this decision was rendered on a motion based upon Subsection (1) of Rule 60(b). Thus, even though the motion to vacate was brought two months before the expiration of the one year period provided in the Rule, the Court examined the circumstances of the case and determined that plaintiff's conduct was

unreasonable. See Woods v. Severson, 9 F.R.D. 84 (D. Neb. 1948).

Finally, it should be mentioned that, even if the plaintiffs bear no responsibility for the events that resulted in the judgment in question, they still may not avoid the effects of their attorney's acts and omissions. Nevertheless, as mentioned in Point I, the plaintiffs are not without an appropriate remedy. The plaintiffs' remedy in such a situation is against their attorney, not against the defendant, for the acts or omissions of that attorney. See Link v. Wabash R., 370 U.S. 626, 633-34 (1962); Universal Film Exchanges, Inc. v. Lust, 479 F.2d 573, 577 (4th Cir. 1973); Geigel v. Sea Land Service, Inc., 44 F.R.D. 1, 2 (D.P.R. 1968).

CONCLUSION

For each of the reasons indicated above, the plaintiffs' motion to set aside the judgment of this Court dated December 19, 1974, should be denied in all respects.

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant
Pan American World Airways, Inc.
One State Street Plaza
New York, N.Y. 10004
212 (344 - 6800)

WILLIAM J. JUNKERMAN,
RANDAL R. CRAFT, JR.,
WILLIAM F. MARTIN JR.,
ROBERT C. HORNER,
Of Counsel.

ORDER OF JUDGE BRUCHHAUSEN DENYING MOTION, DATED 12/19/75

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Motion denied. Order dated December 19, 1975 Walter Bruchhausen Senior U.S.D.J.

GILBERTO GERENA VALENTIN, et al,	
Plaintiffs,	
-against-	73 C 1552 WB
PAN AMERICAN WORLD AIRWAYS, INC., EDWIN GLASSER	NOTICE OF MOTION
Defendants.	

U.S. DISTRICT COURT E.D.N.Y.

DEC 19 1975

TIME A.M. P.M.

TO: HAIGHT, GARDNER, POOR & HAVENS, Esqs.
ATTORNEYS FOR DEFENDANTS

PLEASE TAKE NOTICE that upon the annexed affidavits of t plaintiffs, GILBERTO GERENA VALENTIN, JOSE ANTONIO APONTE VAZ JORGE D. FLORES RUIZ, CARLOS REYES LOPEZ, and JOSEPH MENDEZ R all sworn to the 14th day of November, 1975, and the affidavi the HON. GEORGE W. MILLER, BERTHA DE FAZIO, and LORENZO F. PA all sworn to the 5th day of December, 1975, and upon the anne exhibits, and upon all the records and proceedings had in thi tion, the undersigned will move before the HON. WALTER BRUCHH United States Senoir District Court Judge, at his chambers in UNITED STATES COURTHOUSE, located at 225 Cadman Plaza East, C of Kings, City and State of New York, for the Eastern Distric New York, on the 19th day of December, 1975, at 10:00 o'clock the forenoon of said date or as soon thereafter as counsel ca heard, pursuant to Rule 60, et. seq., to set aside the judgme findings of fact and conclusions of law entered herein on or the 16th day of December, 1974, on the grounds that the plain have a good and meritorious cause of action and the failure t

BEST COPY AVAILABLE

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

FILE NO. 73 C 1552

- -X

GILBERTO GERENA VALENTIN,
JOSE ANTONIO APONTE VAZQUEZ,
JORGE B. FLORES - RUIZ,
CARLOS REYES LOPEZ and
JOSEPH MENDEZ RIVERA,

Plaintiffs,

-against-

NOTICE OF APPEAL

PAN AMERICAN WORLD AIRWAYS, INC.,
and EDWIN GLASSER,

Defendants.

- -X

Notice is hereby given that the five above-named plaintiffs, hereby appeal to the United States Court of Appeals for the Second Circuit from the order, denying a Rule 60 motion for vacatur of the judgment and restoration of the case to the trial calendar, entered in this action on the 19th day of December, 1975.

Dated: January 15, 1976

LORENZO F. PADILLA
277 Broadway
New York, New York 10007
212 227 3410
ATTORNEY FOR THE PLAINTIFFS

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NOTICE OF PRE ARGUMENT CONFERENCE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -X

GILBERTO GERENA VALENTIN, JOSE ANTONIO APONTE VAZQUEZ, GEORGE B. FLORES - RUIZ, CARLOS REYES LOPEZ AND JOSEPH MENDEZ RIVERA,

Plaintiffs-Appellants,

v.

PAN AMERICAN WORLD AIRWAYS, INC., AND EDWIN GLASSER,

Defendants-Appellees.

- -X

PRE-ARGUMENT CONFERENCE

DOCKET NO. 76-7029

A PRE-ARGUMENT CONFERENCE has been scheduled for February 24, 1976 at 11:00 A.M. at the United States Court House, Foley Square, New York, New York 10007 in Room 1804.

The attorneys in charge of the appeal or proceeding are required to attend and to have authority to do whatever is necessary to accomplish the purpose of the conference. A pre-argument conference is for the purpose of considering the possibility of settlement, the simplification of the issues, and any other matters which the Staff Counsel determines may aid in the handling or the disposition of the proceeding. If there is any pertinent matter which counsel wishes to be raised, it may be raised at the Conference.

Dated: January 26, 1976

Nathaniel Fensterstock
Staff Counsel

SEE CIVIL APPEALS MANAGEMENT PLAN OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Camp 11 Notice

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CIVIL APPEAL SCHEDULING ORDER #1

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -X

GILBERTO GERENA VALENTIN, JOSE ANTONIO APONTE VAZQUEZ, GEORGE B. FLORES - RUIZ, CARLOS REYES LOPEZ AND JOSEPH MENDEZ RIVERA,

Plaintiffs-Appellants

v.

PAN AMERICAN WORLD AIRWAYS, INC., AND EDWIN GLASSER,

Defendants-Appellees.

- -X

CIVIL APPEAL SCHEDULING ORDER #1

Docket No. 76-7029

Noting that Lorenzo F. Padilla, Esq. counsel for the appellant has filed a Notice of Appeal, a Civil Appeal Pre-Argument Statement and Transcript Information, and being advised as to the progress of the appeal,

IT IS HEREBY ORDERED that the record on appeal be filed on or before February 6, 1976.

IT IS FURTHER ORDERED that the appellant's brief and the joint appendix be filed on or before March 5, 1976.

IT IS FURTHER ORDERED that the brief of the appellee be filed on or before April 5, 1976.

IT IS FURTHER ORDERED that the argument of the appeal be ready to be heard during the week of Aptil 19, 1976.

IT IS FURTHER ORDERED that in the event of default by appellant in filing the record on appeal or the appellant's brief and the appendix by the time directed or upon default of

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the appellant regarding any other provision of this order, the appeal shall be dismissed forthwith.

IT IS FURTHER ORDERED that if the appellee fails to file a brief within the time directed by this order, such appellee shall be subjected to such sanctions as the court may deem appropriate.

A. DANIEL FUSARO
Clerk

By
Nathaniel Fensterstock
Staff Counsel

Dated: January 26, 1976

LETTER OF LORENZO F. PADILLA TO C.A. STAFF COUNSEL

BY HAND

March 1, 1976

Nathaniel Fensterstock
Staff Counsel
United States Court of Appeals
Second Circuit
Foley Square Courthouse
New York City, New York 10007

Re: Valentin v P.A.W.A., Inc. & E. Glasser

Dear Sir,

This letter is transmitted to you, upon pressures of urgency felt by myself, as a result of the pre-argument conference held at your offices, at the courthouse, on February 27, 1976.

At the end of the conference you had suggested to me and my Associate Counsel, Victor Velazquez, that the appeal be discontinued, upon your impression that the plaintiffs had a matter without merit.

I also take this opportunity to inform you, that I object to the selection of this case, for the presently scheduled accelerated procedure, on the grounds that same will cause a serious injustice to the plaintiffs herein concerned.

The named Victor Velazquez had stated at the conference, that his research had revealed to him, a lack of subject matter jurisdiction in the court. It seems that his youth and inexperience, as he has hardly been admitted two months to practice before the Bar, caused overlooking of certain very signifi-

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cant factors and a most significant case.

At this point, I would charge the defendant herein, with playing fast and loose with the courts and fast and loose at the conference.

The United States Code Service published by the Bobbs-Merrill Company Incorporated, of which I am a subscriber, was reviewed by me after the conference. From our mutual experiences, serving in the New York State Legislature, it would seem that we developed a certain instinct for law which may be otherwise inexplainable, but it does drive us to pursue further research on legal points.

My research revealed that in 1971, two years before this defendant in this action, sought to remove an action into the District Court, upon the provisions of Title 49, §1374, (b), the very same defendant had succeeded in the District Court of Pennsylvania, in having a cas dismissed upon the very same statute, for failure of exausting administrative remedies. '(Eisman v Pan American World Airways, 1971, DC Pa., 336F Supp 543.) Thus, when the defendant petitioned to remove this case into the Federal District Court, in San Juan, Puerto Rico, the defendant had already established case law on the point, that the District Courts lacked jurisdiction of the subject matter of the action.

Further research revealed that this Court, in 1972, in the case of Danna v Air France, 463F2d 407, had affirmed a dis-

missal of an action prosecuted in the District Court, also for failure of administrative proceedings.

I would further add that the statute upon which the defendant herein petitioned for removal, is an administrative statute, as distinquished from a civil action statute. Another citation which I read from my book, which is Price v. Trans World Airways, 481F2d 844, indicates that primary jurisdiction is in the Civil Aeronautics Board therefore an action in the District Court would be stayed pending a determination from the said C.A.B.

I am working on this matter, today Saturday, February 28, 1976, and am thereby unable to further research the point or even Sheppardize the cases in point. As such, I admit that this is a cursory presentation of the point. However, it may be appreciated by you, that I have an affirmative duty as the lawyer for my clients, under the present posture and circumstances of this case, to thoroughly research the point for presentation to the Court.

I therefore respectfully request if you would be able to do so, to grant to me another pre-argument conference, toward the view of removing this case from the specially selected cases for accelerated review. I would suggest that this request is fair in all respects, in that there is presently outstanding a judgment purportedly on the merits of the case, where the very

jurisdiction of the Court is subject to direct attack.

Trusting an early responce from you, I close remaining:

Respectfully yours,

Lorenzo F. Padilla, Esq.

cc: William Jenkerman, Esq.
Haight, Gardner, Poor & Haven, Esq.
1 State Street Plaza
New York City, New York

NOTICE OF MOTION

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- -X

GILBERTO GERENA VALENTIN, JOSE ANTONIO APONTE VAZQUEZ, GEORGE P. FLORES-RUIZ, CARLOS REYES LOPEZ and JOSEPH MENDEZ RIVERA,

Docket No. 76-7029

Plaintiffs-Appellants,

NOTICE OF MOTION

-vs.-

PAN AMERICAN WORLD AIRWAYS, INC. and EDWIN GLASSER,

Defendants-Appellees.

- -X

S I R :

PLEASE TAKE NOTICE, that an order of which the within is a true copy will be presented for issuance to one of the judges of the United States Court of Appeals for the Second Circuit, on the 5th day of March, 1976.

Dated: New York, New York
March 4, 1976

Yours, etc.

LORENZO F. PADILLA
277 Broadway
New York, N. Y. 10007

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ORDER

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- -X

GILBERTO GERENA VALENTIN, JOSE ANTONIO APONTE VAZQUEZ, GEORGE P. FLORES-RUIZ, CARLOS REYES LOPEZ and JOSEPH MENDEZ RIVERA,

Docket No. 76-7029

Plaintiffs-Appellants,

ORDER

-vs.-

PAN AMERICAN WORLD AIRWAYS, INC. and EDWIN GLASSER,

Defendants-Appellees.

--- - - - - - - - - - - - - - - - - - - -X

Upon reading and filing the affidavit of VICTOR VELAZQUEZ, sworn to the fourth day of March, 1976, and upon all the prior pleadings and proceedings had herein, and it appearing that the plaintiffs have shown good cause for an extention of time for prosecuting this appeal,

NOW, on motion of LORENZO F. PADILLA, attorney for the plaintiffs. it is hereby

ORDERED, that pursuant to Rule 26B of the Federal Rules of Appellate Procedure, an enlargement of time to prosecute this appeal is hereby granted until the ninetttenth day of March, 1976.

Dated: New York, New York
March 4, 1976

Judge, United States
Court of Appeals

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MOTION FOR ENLARGEMENT OF TIME TO FILE

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

- -X

GILBERTO GERENA VALENTIN, JOSE ANTONIO APONTE VAZQUEZ, GEORGE P. FLORES-RUIZ, CARLOS REYES LOPEZ and JOSEPH MENDEZ RIVERA,

Plaintiffs-Appellants,

-vs.-

PAN AMERICAN WORLD AIRWAYS, INC. and EDWIN GLASSER,

Defendants-Appellees.

- -X

Docket No. 76-7029

MOTION FOR ENLARGEMENT OF TIME FOR FILING APPELLANTS BRIEF AND JOINT APPENDIX

Pursuant to Rule 26B of the Federal Rules of the Appellate Procedure, the above appellants, move the Court for an order enlarging the time for the filing of its brief and the joint appendix in the above entitled case from March 5, 1976 to March 19, 1976.

Under the provisions of Rule 31A, the appellants brief will be due on March 5, 1976. For the reasons contained in the supporting affidavit, which is filed herewith, the appellants find it essential to make the above request for a two week enlargement of that time.

Dated: March 4, 1976.

LORENZO F. PADILLA
Attorney for Appellants
Office & P. O. Address
277 Broadway
New York, N. Y. 10007

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AFFIDAVIT OF V. VELAZQUEZ IN SUPPORT OF MOTION

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

- -X

GILBERTO GERENA VALENTIN, JOSE ANTONIO APONTE VAZQUEZ, GEORGE P. FLORES-RUIZ, CARLOS REYES LOPEZ and JOSEPH MENDEZ RIVERA,

Plaintiffs-Appellants,

Docket No. 76-7029

-vs.-

AFFIDAVIT IN SUPPORT OF MOTION

PAN AMERICAN WORLD AIRWAYS, INC. and EDWIN GLASSER,

Defendants-Appellees.

- -X

STATE OF NEW YORK)
CITY OF NEW YORK) SS.:
COUNTY OF NEW YORK)

VICTOR VELAZQUEZ, being duly sworn, deposes and says:

1. I am an associate of LORENZO F. PADILLA, the attorney of record for the plaintiffs'appellants in this action. I am making this affidavit because Mr. Padilla is engaged in his position as counselor for the Social Services Committee of the New York State Legislature up in Albany.

2. My knowledge of this case has been acquired from my workings with Mr. Padilla since December 1975, and from an examination of the files in this case and from conversations and communications between Mr. Padilla and myself..

3. This application is for an extension of time to proceed with this appeal. Pursuant to the scheduling order issued in this case by the Court of Appeals Staff Counsel

A-234

NATHANIEL FENSTRSTOCK, dated January 26, 1976, we are currently required to file our brief and joint appendix on March 5, 1976. We ask for an extension of time because of new circumstances that have arisen in this case that preclude us from filing these documents by March 5th.

4. It would be a long and painstaking process to go into all the proceedings and actions in this case, however, some sort of summary is now necessary. This case began in the Superior Court of Puerto Rico in 1973. Plaintiffs in their complaint asserted damages in the nature of false arrests, malicious prosecution and defamation caused by defendants due to an incident on board of one of defendant's aircrafts in San Juan in 1972 and no instant do the plaintiffs assert in their complaint any Federal claim arising from the constitution laws or treaty of the United States. Defendants by petition for removal had this case removed to the United States District Court, District of Puerto Rico. The case was then transferred pursuant to a motion for a change of venue by the defendants for the Eastern District of New York. It was not until this late date, on or about February 1974 that Mr. Padilla became the attorney in this case. He came into the proceeding when defendants made a motion for a dismissal of the complaint on the basis of plaintiffs failure to be present at certain examinations before trial. After numerous procedings on this in December 1974 Hon. Walter Bruchhausen,

Justice District Court, dismissed the plaintiffs complaint and entered a judgment for the defendant with costs. Plaintiffs attorney then sought relief from this judgment via a Rule 60 motion to set aside the default.

5. Mr. Padilla was delayed in prosecuting this case and his Rule 60 motion because of the lack of bilingual attorneys available to handle such cases as this which involve bilingual or Spanish speaking clients, and because at about that time he was required in his new post as counsel for the Social Services Committee. In this capacity Mr. Padilla has worked on matters covering six billion dollars a year, three billion of which are federal funds. He is currently engaged in matters dealing with medicaid fraud with amounts of up to nine hundred million dollars a year of which 450 million dollars are federal funds. From this one sees that any delay in this case is excusable.

6. As stated before in December 1975 I came to work for Mr. Padilla. I had had the good fortune of being one of the few bilingual persons who had passed the recent New York State Bar examination. From that date we have been able to more efficiently deal with our case loads. Due to this we have been able to come up with some new issues in this case which were never dealt with in the District Court. These deal with truly crucial matters as they go to the essential subject matter of this Court over this case.

7. As stated before this case was removed from the Superior Court of Puerto Rico to the United States District Court. The law on this subject, Title 28 United States Code 1441, states that for removal jurisdiction the case must be one that could have originally begun in the United States District Court. Under this there are two possible matters of original jurisdiction, diversity jurisdiction and federal question jurisdiction. Here there is no diversity jurisdiction as plaintiffs and defendants are New York residents. The issue is then where there is federal question jurisdiction over this case.

8. From a reading of the cases it seems for this federal claim jurisdiction there must be an assertion in the plaintiffs complaint itself alleging a claim under constitution law or treaties of the United States. And reading the complaint there seems no assertion arising under such constitition law or tready of the United States. All the plaintiffs are suing for is malicious prosecution, false arrest and defamation caused by the defendant. These are State claims. There is no assertion of any federal claim whatsoever.

9. Defendants in their own removal petition make the first assertion of any federal claim. They state that federal question jurisdiction lies on the basis of Title 49 U.S. Code 1374B that plaintiffs assert discrimination on an air carrier. This is the first mention of said federal statute in the papers of this case. At no time did the plaintiffs assert such statute,

they intended to rely solely the basic state claims of malicious prosecution and false arrest and defamation. The remedy they sought was not a federal one.

10. These were all matters that were discussed at the pre-argument conference held on February 27, 1976. We now come to the primary reason for our application for an adjournment at this late date. The basis for our application is that a new issue has arisen as to the jurisdiction of this Court having read the statute 1374, it appears that this statute is intended more as administrative remedy than as a civil one. In the case in which this same defendant, PAN AMERICAN WORLD AIRWAYS, was a defendant, (Eisman v. Pan American World Airways, 1971, D.C. Pa., 336 F. Supp. 543) this defendant succeeded in the District Court of Pennsylvania having a case dismissed upon this very same statute, Title 49, Section 1374, for failure of exhausting administrative remedies. Also in 1972 in the case of Danna v. Air France, 463 F. 2nd 407, this Court of Appeals affirmed a dismissal of an action prosecuted in the District Court also for failure of administrative proceedings. What appears from these cases is that this statute is primarily an administrative statute and that civil action cannot depend on this statute. It would appear to be an injustice to this Court to allow the defendant herein, PAN AMERICAN WORLD AIRWAYS to herein assert this statute as a basis for removal jurisdiction when in another proceeding in the Federal Court it has used this same statute to

preclude a plaintiff from asserting a claim in a District Court. It is primarily to further research this point that we seek an extension of this appeal.

11. If this were an ordinary point in the course of an appeal such an extension would properly not be granted. However, in this case, the issues involved the basis jurisdiction of this Court. It would be injurious to the interests of our plaintiffs, in particular, and the interest of justice, in general, to allow a judgment on the merits to stand when there involves an obvious question as to the jurisdiction of this Court over the matter at issue.

12. Since subject matter jurisdiction is a challenge to the inherent power of a Court to deal with a controversy such a challenge can be raised any time in the course of a proceeding. It can be raised for the first time on appeal and the Court, even on its own motion, can and should raise the jurisdictional issue whenever there appears to be a question as to the Courts jurisdiction over a particular matter.

13. As such the issue which must be researched deals with an issue which is so crucial to these proceedings that an extension of time to present this jurisdictional argument should be granted. It would be a grave injustice to permit plaintiffs judgment in the Federal Court to stand when there is a serious question as to the Court's power to grant such a judgment.

WHEREFORE, I, as representative of the attorney of record,

LORENZO F. PADILLA, respectfully requests that this Court pursuant to the provisions of Rule 26, Federal Rules of Appellate Procedure, grant the extension herein requested together with all other relief as may be deemed just and proper.

VICTOR VELAZQUEZ, ESQ.

Sworn to before me this
4th day of March, 1976.
s/ LOUIS ROSEN

AFFIDAVIT OF WM. J. JUNKERMAN IN OPPOSITION

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

GILBERTO GERENA VALENTIN, JOSE ANTONIO APONTE VAZQUEZ, GEORGE P. FLORES-RUIZ, CARLOS REYES LOPEZ and JOSEPH MENDEZ RIVERA, Plaintiffs-Appellants, -against- PAN AMERICAN WORLD AIRWAYS, INC. and EDWIN GLASSER, Defendants-Appellees.	Docket No. 76-7029 AFFIDAVIT IN OPPOSITION TO PLAINTIFFS-APPELLANTS' MOTION FOR AN EXTENTION OF TIME FOR FILING APPELLANTS' BRIEF

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WILLIAM J. JUNKERMAN, being duly sworn, deposes and says:

1) I am an attorney-at-law and a member of the firm of Haight, Gardner, Poor & Havens, attorneys for defendant-appellee Pan American World Airways in the above-entitled action. I am fully familiar with the facts and circumstances set forth herein.

2) This affidavit is submitted in opposition to the plaintiffs-appellants' motion for an extension of time for filing their brief and joint appendix.

3, Plaintiffs-appellants' application for an extension of time should be denied for a number of reason. First, plaintiffs-appellants have failed to comply with Rule 7 of the Federal Rules of Appellate Procedure, in that no bond for costs was

filed by the appellants with their notice of appeal. Secondly, during the pre-argument conference which was held before Nathaniel Fensterstock Esquire on February 27, 1976, it was discovered that, neither the attorney of record for the plaintiffs-appellants Lorenzo F. Padilla, nor his assistant Victor Velazquez are admitted to practice before this Court. Consequently, these attorneys have no standing to make the present application, let alone prosecute this appeal.

4. Finally, and most important, it is evident that the plaintiffs-appellants' motion for an extension of time should be denied in consideration of the past history of this case and the nature of the present appeal. This action was dismissed by the Honorable Walter Bruchhausen on December 9, 1974, for lack of prosecution pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. The plaintiffs-appellants filed no notice of appeal from Judge Bruchhausen's order. Almost one year after the date of the Judge's order, the plaintiffs-appellants moved to restore this case to the trial calendar pursuant to Rule 60 of the Federal Rules of Civil Procedure. This motion was summarily denied, without opinion, by Judge Bruchhausen. The plaintiffs-appellants' present appeal is from Judge Bruchhausen order denying their rule 60 motion. Therefore, since this matter was originally dismissed by the District Court for lack of prosecution, it is respectfully submitted that the plaintiffs-appellants should not be allowed to permit yet another

delay in the final resolution of this action.

5. The plaintiffs-appellants in their present motion papers are attempting to assert, for the first time, an argument of lack of subject matter jurisdiction. It is not your deponent's intention to discuss the merits of this appeal in the opposition to the present motion. Suffice it to say that the defendants-appellees first proposed a basis for federal subject matter jurisdiction in this action on June 25, 1973, or nearly three years ago.

WHEREFORE, defendant-appellee respectfully requests that the plaintiffs-appellants' motion for an extension of time be in all respects denied, and that this appeal should be dismissed for failure to prosecute pursuant to Rule 28 of the Federal Rules of Appellate Procedure.

William J. Junkerman

Sworn to before me this
4th day of March, 1976.

s/ Ruby M. Fitzhugh
Notary Public

REPLY AFFIDAVIT OF L. F. PADILLA

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
- -X

GILBERTO GERENA VALENTIN, JOSE ANTONIO APONTE, GEORGE F. FLORES RUIZ, CARLOS REYES LOPEZ, JOSEPH MENDEZ RIVERA,

Plaintiffs Docket # 76-7029

-against- REPLY AFFIDAVIT

PAN AMERICAN WORLD AIRWAYS, and, EDWIN GLASSER,

Defendants.

- -X

STATE OF NEW YORK)
CITY OF NEW YORK) ss.:
COUNTY OF NEW YORK)

LORENZO F. PADILLA, Esq., being duly sworn deposes and says:

1. This deponent is the attorney of record for the plaintiffs herein and submit this reply affidavit upon personal knowledge of all facts recited herein.

2. I would submit that the opponent to the motion, WILLIAM J. JUNKERMAN, Esq., of the law firm of Haight, Gardner, Poor & Havens, Esqs., is being less than candid to this Court, in paragraph numbered 3 of his affidavit.

3. The pre argument conference refered to by Mr. Junkerman, did elicit from me certain facts relative to my status in this action and in this Court.

4. It was explained that approximately five years ago I was assigned and designated to prosecute an appeal in the case

of U.S.A. v. ANGULO. At that time I explained to this Court my status and asked to be relieved of the appeal. This Court in its Order not only kept me on the appeal, which I prosecuted but also put my name on the Criminal Justice Act Panel. I also received the annual forms to be kept on the C.J.A. Panel. Thus, I was under the sincere impression that by the acts enumerated this Court had admitted me to practice before it. Mr. Fensterstock concluded that this Court had only admitted me for the one appeal but, that does not seem to coincide with this Court putting my name on the C.J.A. Panel.

5. I thereafter purchased two sets of law books, West's Federal Practice and Forms, and, United States Code Service, in order to be properly prepared to serve in the Federal Courts. I still maintain the said books.

6. I would further submit that the lack of candor is an attempt to obscure from this Court the very serious issue of lack of subject matter jurisdiction in the present judgment extant in the action. Furthermore and equally serious in the appeal is the position of the defendants-appellees, in that the leading case in point and in favor of the appellants was prosecuted by the defendant Pan American World Airways, in the District Court of Pennsylvania; Eisman v. Pan American World Airways, 336 F Supp 543.

7. It should be noted by this Court that the opponent seeks to avoid the point and completely fails to meet or controvertit.

8. Were I not required to be in Albany, New York, two to three days each week, I would not have to ask for this relief. My work in Albany is presently most important to both the State and the Federal Government, in that there is a Six Billion Dollars budget, with proven thirty per cent probable frauds; or say, frauds which presently exceed Nine Hundred Million Dollars. Query, can this Court fail to take the losses to the State and Federal Governments into consideration against a request for only a fifteen days extension?

9. Most important the defendants-appellees failed in their opposition to show how they would in any manner be prejudiced by the requested extension.

10. I would also inform this Court that I have taken heed to Mr. Fensterstocks directions to be formally admitted to this Court via the required application, which is being completed for submission.

WHEREFORE, it is respectfully requested that the requested extension be granted to March 19, 1976, to file the joint appendix and briefs, together with all other relief deemed just and proper.

Sworn to before me this
5th day of March, 1976

s/ Louis Rosen
Notary Public

LORENZO F. PADILLA, Esq.

ORDER OF JUDGE GURFEIN DENYING MOTION

76-7029
C-6
SC

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 10th day of March, one thousand nine hundred and Seventy-six.

- -

Gilberto Gerena Valentin, Jose Antonio Aponte Vazquez, George B. Flores-Ruiz, Carlos Reyes Lopez and Joseph Mendez Rivera,

Plaintiffs-Appellants,

v.

Pan American World Airways, Inc., and Edwin Glasser,

Defendants-Appellees.

- -

It is hereby ordered that the motion made herein by counsel for the appellants dated March 4, 1976 to extend the time to file a brief and joint appendix to and including March 19, 1976 be and it hereby is denied.

MURRAY I. GURFEIN

Cuircuit Judges

ORDER DISMISSING APPEAL

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 12th day of March, one thousand nine hundred and seventy six.

- -

Gilberto Gerena Valentin, Jose Antonio Aponte Vazquez, George B. Flores-Ruiz, carlos Reyes Lopez and Joseph Mendez Rivera,

Plaintiffs-Appellants, 76-7029

v.

Pan American World Airways, Inc., and Edwin Glasser,

Defendants-Appellees.

- -

A scheduling order having been entered herein in accordance with paragraph 4 of the Civil Appeals Management Plan of this court directing that the record on appeal shall be filed on or before 2-6-76 and that the appellant's brief and joint appendix shall be filed on or before 3-5-76 and that in the event of default by the appellant in either of which the appeal shall be dismissed forthwith

And said brief and appendix not having been so filed

Upon consideration thereof, it is ordered that the appeal from the order of the United States District Court for the Eastern District of New York be and it hereby is dismissed.

By: Vincent A. Carlin
Chief Deputy Clerk

A. Daniel Fusaro
Clerk

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NOTICE OF RULE 60(b) (4) MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -

GILBERTO GERENA VALENTIN, JOSE ANTONIO APONTE VAZQUEZ, GEORGE B. FLORES-RUIZ, CARLOS REYES LOPEZ and JOSEPH MENDEZ RIVERA,

73-C 1552

Plaintiffs,

-against-

NOTICE OF MOTION

PAN AMERICAN WORLD AIRWAYS, INC., and EDWIN GLASSER,

Defendants.

- - - - - - - - - - - - - - - - - - -

TO: HAIGHT, GARDNER, POOR & HAVENS, ESQS.
Attorneys for Defendants

PLEASE TAKE NOTICE, that upon the annexed affidavit of the plaintiff, GILBERTO GERENA VALENTIN, sworn to the 16th day of April, 1976, and the affidavit of LORENZO F. PADILLA, ESQ., sworn to the 29th day of March, 1976, and upon the annexed Exhibits, and upon the annexed Memorandum of Law, and upon all the records and proceedings had in this action, the undersigned will move before the HON. WALTER BRUCHHAUSEN, United States Senior District Court Judge, at his chambers in the United States Court House, located at 225 Cadman Plaza East, County of Kings, City and State of New York, for the Eastern District of New York, on the 21st day of May, 1976 at 10:00 o'clock in the forenoon of said date, or as soon thereafter as counsel can be heard, pursuant to Rule 60b (4), to set aside the judgment,

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findings of fact and conclusions of law entered herein on the 19th day of December, 1974, on the grounds that said judgment is void in all respects because the Court lacked subject matter jurisdiction over this action, and the undersigned will further move this Court in the reater interests of justice for leave for the plaintiffs to pursuit their remedy in the State Courts, together with all other and further relief as the Court may deem just and proper in the premises.

Dated: New York, New York
April 23, 1976

Yours, etc.,

LORENZO F. PADILLA, ESQ.
Attorney for Plaintiffs
Office & P. O. Address
277 Broadway
New York, New York 10007
(212) 227-3410

TO:

HAIGHT, GARDNER, POOR & HAVENS, ESQS.
Attorneys for Defendants
Office & P. O. Address
One State Street Plaza
New York, New York 10004
(212) 344-6800

AFFIDAVIT OF G. VALENTIN IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -

GILBERTO GERENA VALENTIN, et al,

Plaintiffs,

73 C 1552

-against-

AFFIDAVIT IN SUPPORT OF MOTION

PAN AMERICAN WORLD AIRWAYS, INC., and EDWIN GLASSER,

Defendants.

- -

STATE OF NEW YORK)
CITY OF NEW YORK) SS.:
COUNTY OF NEW YORK)

GILBERTO GERENA VALENTIN, being duly sworn, deposes and says:

1. This deponent is a plaintiff in the above entitled action, and respectfully submits this affidavit to this Court, in support of the motion to vacate the judgment heretofore had herein, and to permit the plaintiffs to prosecute this case in the State Courts, on the grounds that all the proceedings heretofore had in the District Court are null and void because of lack of jurisdiction, and this affidavit is made upon personal knowledge of all facts and circumstances as will be recited herein.

2. The facts and circumstances which gave rise to the action are that on October 30, 1972, around 10:45 P.M., the plaintiffs, who were on board of an airplane of the defendants, regularly known as Flight Number 296, returned to the

A-251

City of New York, were caused to be arrested and incarcerated by the defendants without any probable cause or provocation.

3. After their arrest, the plaintiffs were subsequently exonerated and released. This deponent, along with the other co-plaintiffs, then commenced this action to seek redress for the defendants having caused their arrests and prosecution.

4. To prosecute the action in Puerto Rico, this deponent retained the services of a Puerto Rican attorney, LUIS G. ESTANDES. This deponent then returned to his home in New York. Due to the long distances involved between the site of the action, Puerto Rico, and New York, this deponent's home, there was very little direct contact between this deponent and the actual litigation of the action. This deponent was, therefore, not always familiar with the basic proceedings in the case. There was in all respects, general lack of communications between this deponent and the attorney prosecuting the action, Mr. Estandes.

5. Thus, when this matter was removed from the Superior Court of Puerto Rico to the Federal District Court in Puerto Rico, this deponent was not aware of the reasons behind such removal. Since soon after the case was transferred to the Eastern District Court of New York, this deponent was forced to seek a new attorney to handle this case, this, therefore, was another factor in preventing this deponent from learning of the

factors behind the removal. Since Mr. Estandes was no longer the attorney in the case, there was even less communication than before.

6. Since this deponent had no knowledge of any problems with the removal to the Federal District Court, this deponent at all times proceeded with the case pursuant to said removal and continued the case in the Federal District Court for the Eastern District of New York.

7. This deponent was then informed by counsel that a judgment on the merits without trial pursuant to Rule 41b of the Federal Rules of Civil Procedure, had been entered against the plaintiffs. This judgment charged the defendants with over $14,000.00 in costs, as all the plaintiffs are workingmen, this was greatly onerous to us. Through our counsel, therefore, we have naturally, actively sought to free ourselves from this judgment.

8. This deponent then, on advice of counsel, transmitted a letter to the original attorney in this action, LUIS G. ESTANDES. He informed us in a letter annexed hereto, that the reason for the removal from the Superior Court of Puerto Rico to the Federal District Court was on diversity grounds. This letter was immediately given to the present counsel in this case, Mr. Padilla. It was at this time that Mr. Padilla was first informed of all the factors relating to the removal. Mr. Padilla read the letter and informs me that Mr. Estandes

assertion is incorrect. Mr. Estandes states that removal was on the basis of diversity grounds, yet also states that the plaintiffs were New York residents and PAN AMERICAN central offices were also in New York. Mr. Padilla informs me that because of this there is no diversity because PAN AMERICAN is also held to be a New York citizen as are the plaintiffs. Furthermore, the petition for removal states no claim of diversity jurisdiction but rather that the District Court has original jurisdiction on the basis of a Federal claim arising under some discrimination Statute.

9. This deponent is further informed by counsel and verily believes that there is a serious question as to the jurisdiction of this Court to handle this action. In the Complaint there is no allegation of any Federal claim or right. Also, in the removal petition, it is the defendants who make the first assertion of any Federal Statute. They assert that the plaintiffs allege a violation of Section 49, United States Code, 1374b. Counsel has informed this deponent that this Statute is more in the nature of an administrative law Statute as to the procedures of the Civil Aeronautics Board and that this is not a true civil action Statute and that, therefore, this cannot be the basis of Federal jurisdiction.

10. Another serious point is that in the Findings of Fact of the HON. WALTER BRUCHHAUSEN, entered December 19, 1974, there is no finding as to any Federal jurisdiction at all in

this case. Without a trial, the Court exonerated PAN AMERICAN WORLD AIRWAYS stating their actions were proper and justifiable, and their acts did not constitute malicious prosecution, and awarded the defendant costs against this deponent, and yet found no subject matter jurisdiction. Even to a layman, as this deponent is, this seems a rather curious event since as stated, this deponent never had his day in Court and all these Court findings were made upon a unilateral submission by the defendants' counsel.

11. The issue of subject matters jurisdiction will be further amplified in the separate affidavit of counsel and in the accompanying Memorandum of Law. It only remains for this deponent to state that from my own knowledge of the herein stated facts and from information received from trial counsel, that there is a serious question of jurisdiction and that this question is so inherent to the power of a Court, that it necessitates a finding, at this time, by this Court, on whether there is in fact the necessary subject matter jurisdiction by this Court for there to be a valid judgment. This issue was never decided in the judgment and should now be resolved.

12. No prior request for this relief has been made.

WHEREFORE, this plaintiff respectfully requests this Court pursuant to the provisions of Rule 60b (4) to grant the relief herein requested, together with all other relief as may

be deemed just and proper.

GILBERTO GERENA VALENTIN

Sworn to before me this

16th day of April, 1976.

Notary Public

AFFIDAVIT OF LORENZO PADILLA IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -

GILBERTO GERENA VALENTIN, et al,

Plaintiffs, 73 C 1552

-against- AFFIDAVIT IN SUPPORT OF MOTION

PAN AMERICAN WORLD AIRWAYS, INC., and EDWIN GLASSER,

Defendants.

- - - - - - - - - - - - - - - - - - - -

STATE OF NEW YORK)
CITY OF NEW YORK) SS.:
COUNTY OF NEW YORK)

LORENZO F. PADILLA, ESQ., being duly sworn, deposes and says:

1. Deponent is the attorney for the plaintiffs herein, and submits this affidavit in support of the instant motion pursuant to Rule 60b (4) Federal Rules of Civil Procedure, upon personal knowledge of all facts recited herein.

2. This case was originally commenced in the Superior Court of Puerto Rico. It was later removed upon petition by the defendants to the Federal District Court for the District of Puerto Rico. It was then transferred, again upon motion by the defendants, to the Eastern District of New York, where the case continues.

3. It was not until this time, when defendants moved to dismiss plaintiffs' complaint, that this deponent came into the case. This was sometime in February or March of 1974.

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Since this deponent had not handled the case originally when it was in Puerto Rico, he was not totally knowledgeable as to all the facts and circumstances surrounding the removal of this action to the Federal District Court. This deponent, therefore, assumed that all the proceedings involved with the removal, were correct and that this Court did have jurisdiction over this action.

4. The fact that this deponent is one of the few Spanish speaking attorneys available to handle the vast number of Spanish speaking clients in the New York area, and the fact that this deponent has recently been named as counsel for the Social Services Committee of the New York State Legislature, prevented me from further researching the removal and caused me to consider the matter settled. However, instinctively, noting that complaint alleged solely false arrest, malicious prosecution and deformation it struck me that perhaps there was an issue as to Federal jurisdiction. This resulted in my stating the same in the original Rule 60 motion made for vacatur of the judgment and restoration of the case to the Trial Calendar on the basis of excusable neglect and fraud.

5. It was during the appeal from the denial of this motion that this office received a letter from the original attorney in this action, LUIS ESTADES, ESQ. In this letter, a copy of which is annexed hereto, numbered Exhibit "1", dated February 2, 1976, states that the foundation for removal from

Superior Court of Puerto Rico to the Federal District Court was diversity jurisdiction. This, however, must be an erroneous assertion because Mr. Estades in his own statement says that the plaintiffs were New York residents and that the main offices of the defendant, PAN AMERICAN, were in New York City. Under Federal Law, this makes PAN AMERICAN a New York citizen and coupled with New York plaintiffs precludes any diversity of citizenship jurisdiction. That the basis of removal was not diversity grounds is also further proven in defendants' removal petition. The basis of Federal jurisdiction claimed is that the plaintiffs assert a right arising from the Constitution, Laws and Treaties of the United States. The question of jurisdiction, therefore, depends on whether there is this claimed Federal question jurisdiction.

6. A reading of the cases demonstrates that for Federal question jurisdiction the plaintiff in his complaint must assert a Federal claim which arises from Constitution, Laws or Treaties of the United States. The plaintiffs allege damages in the nature of false arrest, malicious prosecution and deformation. These are all state claims. The first mention of any Federal Statute is not in plaintiffs' complaint, but in defendants' own removal petition. Therein, the defendant asserts Federal jurisdiction on the basis of Title 28, United States Code, Section 1331 and upon Title 49, United States Code, Section 1374b. The plaintiffs did not assert these Statutes. Why

should defendant be allowed to assert these Statutes to give the Court Federal jurisdiction? The Law states that it is the plaintiff's complaint that gives a Federal Court jurisdiction and not the defendant's removal petition.

7. Furthermore, an investigation of the Statute asserted by the defendant for removal shows that this Title 49, United States Code, 1374b, is more in the nature of an administrative law statute and not a Civil Action Statute. This Statute relates more to procedures before the Civil Aeronautics Board, then as to a basis for an action in a district court. In fact, in one of the few cases on the subject, Eisman vs. Pan American World Airways, (1971, DC Pa., 336 F. sup. Supp. 543.) this same defendant, Pan American, had a case upon this very same Statute dismissed for failure to exhaust administrative remedies. It would seem anomalous, to allow a defendant such as Pan American to use a Statute in one instance to have a case dismissed from the Federal District Court and then allow that same defendant to use the same Statute to later remove a case to the Federal District Court.

8. The question of Federal jurisdiction has never been raised before in this case. In the Findings of Fact and Conclusions of Law, the Court totally exonerated the defendants from liability without there being a trial and yet made no finding of whether this Court did have jurisdiction over this action. Since a challenged subject matter jurisdiction goes to the in-

herent power of a court to hear an action, this deponent has felt it necessary to proceed with this new Rule 60 motion. If the Court had no jurisdiction, then all the proceedings in the Federal District Court are null and void. Because of this, the plaintiffs should then be given leave to proceed with their remedies in the State Court.

WHEREFORE, it is respectfully requested that the instant motion prosecuted by Rule 60b (4), of the Federal Rules of Civil Procedure, be granted in all respects on the grounds that all the proceedings herein had in this Federal District Court are void due to lack of subject matter jurisdiction by this Court over this action, and under the further grounds that the plaintiffs should be in the interests of justice granted their day in Court in this action, together with all relief being just and proper.

LORENZO F. PADILLA, ESQ.

Sworn to before me this
29th day of March, 1976.

s/ Louis Rosen
Notary Pulbic

EXHIBIT #1

CONTESTACION A LAS PREGUNTAS

3. Is there an automatic or statutory regulated right to trial by jury?

Como tu sabes en Puerto Rico en las cortes estatales los casos civilew se ven ante jueces y no existe los jurados para adjudicar los mismos. Por esa obvia razón no solicité juicio por jurado en mi demanda. Creo por ello que en virtud de la Regla 81 C o 38 de las Reglas de Procedimiento Civil Federal ustedes tenían y tienen derecho a un juicio por jurado ya que las reglas de derecho aplicables son las siguientes:

"Demand for jury trial is not necessary if it has been made in the state court prior to removal or if the state law does not require an express demand"

4. What question of Federal juris diction was involved to remove the case from the Insular (State) Courts to the Federal Courts?

La contestación a esta pregunta aparece claramente expuesta en las alegaciones que te enviara inmediatamente de ser el caso trasladado a Estados Unidos. No puede perserse de vista que ustedes eran y son ciudadanos del estado de New York y Pan American esta incorporada en Puerto Rico como Pan American de Puerto Rico Company Inc. y por tanto existe diversidad de ciudadania. Además como expliqué largamente en mis cartas todos ustedes son residentes y ciudadanos de la ciudad de New York y las oficinas centrales de Pan American están localizadas en esa ciudad. En realidad de verdad estimé que ustedes tenían mucha mas oportunidad ante un jurado de New York de obtener una suma razonable de dinero que ante un juicio ante el jurado de Puerto Rico ya que estos tienden a ser conservadores (tacaños) en la concesión de daños y perjuicios solicitado en casos de la naturaleza del que ustedes se vieran envueltos. En cuanto al perjuicio legal en contra de ustdes t4 lo expusé ampliamente en mi carta y creía que aunque podría haber existido prejuicio en New York no podía ser tanto y tan perjudicial como el que había en un sitio tan pequeño como en nuestro país contra ustedes en la Corte Federal. Todo se controla a que el abogado hubiera actuado a tiempo y logrado que el caso se ventilara allá en el tribunal mas conveniente para ustedes teniendo con consideración todas pas peculiares circunstancias de vuestro caso.

San Juan, Puerto Rico, a 2 de febrero de 1976.

LUIS G. ESTADES

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Exhibit #1

MEMORANDUM OF LAW IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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GILBERTO GERENA VALENTIN, et al,

Plaintiffs,

-against- 73 C 1552

PAN AMERICAN WORLD AIRWAYS, INC., and EDWIN GLASSER,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO SET ASIDE JUDGMENT

STATEMENT

This is an action in the nature of false arrest, malicious prosecution and deformation seeking damages in the sum of $1,500,000.00 arising out of an incident occurring on board one of defendants' aircraft in San Juan, Puerto Rico on October 30, 1972. Plaintiffs had legally boarded said aircraft, flight 296, for passage from Puerto Rico to their homes in New York. For no apparent reason, they were asked to leave by the defendant, EDWIN GLASSER, pilot of the plane and a Pan American employee. Because plaintiffs refused to so leave at the instigation of the defendants, they were arrested by Puerto Rican authorities. After being exonerated and released, they were arrested at the instigation of the defendants by FBI agents for a so-called violation of the Federal Hijacking Statute. The plaintiffs were again exonerated of all charges and released.

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Plaintiff then commenced this action in May, 1973 in the Superior Court of Puerto Rico, San Juan Part, against the defendants, PAN AMERICAN WORLD AIRWAYS, INC., and EDWIN GLASSER. On June 23, 1973, defendants removed this action to the United States District Court for the District of Puerto Rico. Defendants subsequently moved on July 6, 1973 for a change of venue to the Eastern District of New York, which motion was granted by Order entered October 10, 1973 and the case proceeded in the Eastern District of New York.

In the original action the attorney for the plaintiffs was a Puerto Rican attorney, LUIS G. ESTADES. Upon the removal and transfer of the case to New York, plaintiffs retained a New York attorney, LORENZO F. PADILLA. Mr. Padilla, entered the proceedings in February, 1974 upon defendants' motion for dismissal of plaintiffs' complaint.

The action continued with Mr. Padilla as counsel for the plaintiffs. After numerous proceedings, this case was set down for trial on December 16, 1974, before the HON. WALTER BRUCHHAUSEN, Senior District Court Judge. Plaintiffs' attorney sought to inform Court of his inability to appear on that date, but the papers were erroneously titled and filed as Notice of Entry. On December 6, due to plaintiffs' non-appearance, Judge Bruchhausen granted defendants' motion to dismiss the plaintiffs' petition pursuant to Rule 41b of the Federal Rules of Civil Procedure. Judgment for the defendants with $14,291.25

for costs, and Findings of Fact and Conclusions of Law were entered three days later on December 19, 1974.

On December 10, 1975, plaintiffs' notice to be heard on Rule 60 motion for a vacatur of the judgment and restoration of the case to the trial calendar on the grounds of excusable neglect and fraud. This motion was heard on December 19, 1975 and summarily denied by Judge Bruchhausen. From this denial, plaintiff appealed to the United States Court of Appeals having filed the required Notice of Appeal on January 15, 1976. This appeal was subsequently dismissed on March 12, 1976 for failure to file briefs and joint appendix.

Plaintiff brings this new motion to litigate an issue which was never litigated either in the original proceedings, initial Rule 60 motion, or at the appeal stage. This issue relates to the important question of whether this Court actually ever had jurisdiction over this action. In the Findings of Fact entered by the Hon. Walter Bruchhausen, there was no determination as to whether this Court actually had subject matter jurisdiction over this action.

This memorandum addresses itself to this issue. As will be demonstrated below, this action should never have been removed to the Federal District Court. There was no basis for any Federal jurisdiction whatsoever, since the plaintiffs, in their complaint, did not allege any Federal claim whatsoever. Also, this memorandum will demonstrate that the Statute under

which the defendants sought and achieved removal was not a proper basis for jurisdiction in that it is itself an administrative law Statute. This memorandum will further demonstrate that due to this lack of subject matter jurisdiction, all the proceedings had herein are void, therefore requiring that the judgment had herein be vacated.

POINT 1

THE JUDGMENT SHOULD BE SET ASIDE BECAUSE THIS COURT LACKS SUBJECT MATTER JURISDICTION SINCE THERE WAS NO FEDERAL CLAIM WHATSOEVER ASSERTED IN PLAINTIFFS' COMPLAINT.

This case came initially to the Federal Court through a petition for removal. The case was removed from the Superior Court of Puerto Rico to the Federal District Court for the District of Puerto Rico and later transferred to the District Court for the Eastern District of New York.

The basis for removal under Title 18, United States Code, Section 1441 was an asserted original Federal jurisdiction of this case under Title 18, United States Code, Section 1331 and Title 49, United States Code, 1374. Admittedly, if the Court would have had original jurisdiction under these two Statutes, the removal would have been proper and no challenge to it would be possible at this time.

However, the appellant now challeges this removal because the Court had no removal jurisdiction since this is not a case which a District Court would have had original jurisdic-

tion over, i.e., this Court has no subject matter jurisdiction.

The removal Statute, Title 28, United States Code, Section 1441 (a) states:

> "Any Civil Action brought in a state court of which the District Courts of the United States have original jurisdiction may be removed by the defendants to the District Court of the United States for the District .... where such action is pending."

The pertinent phrase here is "of which the District Courts of the United States have original jurisdiction." There are two basis of such original jurisdiction: Diversity jurisdiction and Federal question jurisdiction. Here, diversity jurisdiction is not applicable since the plaintiffs and defendants are New York residents. (also the defendants did not even raise such jurisdiction or basis). The basis for a jurisdiction, therefore, must be under Federal question jurisdiction. The pertinent Statute herein, Title 28, United States Code, Section 1331 (a) states:

> "The District Courts shall have original jurisdiction of all Civil actions ehrein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs and arises under the Constitution, Laws or Treaties of the United States."

Since the action admittedly exceeds $10,000.00, the question of whether this Court has subject matter jurisdiction over this action depends on whether the matter in controversy "arises under the Constitution, Laws or Treaties of the United States."

This presents two issues for determination. First, when did the case arise under the Constitution, Laws or Treaties of the United States and second, what evidence is used to ascertain whether a case does arise under the Constitution, Laws or Treaties of the United States.

The Courts on numerous occasions have made such determinations and the Law seems to be fairly clear.

The Supreme Court has stated:

> "A case may be truly said to arise under the Constitution or Laws of the United States whenever its correct decision depends on the construction of either." Cohens vs. Virginia, 19 US 264 (1821); Tennessee vs. Davis, 100 US 257 (1880); Macon Grocery Company vs. Atlantic Coastline Railroad Company, 215 US 501 (1910).

> "There must be a real and substantial dispute as the affect or construction of the Constitution or some Law upon the determination of which the dispute depends." McCain vs. DesMoins, 174 US 168 (1899); United Public Workers vs. Mitchell, 330 US 75 (1947).

> "For jurisdiction the suit must have been one in which some right would be defeated or sustained by construction of the Constitution, Laws or Treaties of the United States." New Orleans, Mobile and Texas Railroad Company vs. Mississippi, 102 US 135 (1880); Gully vs. First National Bank, 299 US 109 (1936); Bell vs. Hood, 327 US 678 (1946).

Two New York District Court cases also clarify the Law on this subject. In Smith vs. Barnett, 242 Fed. 83, 1917, DC New York, the Court states that "plaintiff must have claimed the right under the Federal Constitution or Laws and sought to enforce it before an action became subject to Federal juris-

diction."

In Nelson vs. Laiden, 82 F Supp. 661, 1949, DC NY, the Court stated that "a genuine and present controversy must exist as to the construction or interpretation of the Constitution or of a Statute of the United States" for there to be Federal jurisdiction.

On the first point, therefore, the Law is clear that for a case to "arise under the Constitution, Laws or Treaties of the United States" there must be a Federal right asserted in the law suit with said right being an essential element of the law suit. As will be later demonstrated, this did not occur in the case at bar.

On the second point, the Courts again have been straightforward and consistent.

In Chappell vs. Waterworth (155 US 102, 1894), the Supreme Court stated:

> "A case could not be removed to Federal Court as one arising under the Constitution, Laws or Treaties of the United States, unless that (issue) appeared from plaintiff's statement of his own claim; if it did not appear, the warrant could not be supplied in the petition for removal or in a subsequent pleading."

Other cases have followed this Ruling:

> "That claim arose under Constitution or Laws of the United States had to appear from plaintiff's statement of his claim." Spencer vs. Duplan Silk Company, 191 US 526 (1903); Minnesota vs. Northern Securities Company, 194 US 48 (1904); Louisville and Nashville Roadroad Company vs. Mottley, 211 US 149.

"Jurisdiction of Federal District Court was determined by allegations of the complaint." Moore vs. Chesapeake & Ohio Railway Company, 291 US 205 (1934).

"Allegations of complaint controlled question of jurisdiction." Hillsboro vs. Cromwell, 326 US 620 (1946).

Therefore, on second point it is obvious that the Federal Claim "arising under Constitution, Laws or Treaties of the United States" which is an essential element of the law suit must be asserted in the complaint itself.

On point is the case of Stauf vs. Schweizerisch Krevitanstalt (45 F Supp. 449, 1942, DC New York). Here the Court stated: "controversey with respect to the Federal rights must be disclosed upon the face of the complaint unaided by answer or by the petition for removal."

In summary, the Rules are that for Federal jurisdiction to exist there must be a claim asserted which depends on Federal Law and disclaim must be asserted in the complaint,

Applying these Rules to the instant case, one finds that the criteria for Federal jurisdiction are not met. Nowhere in the complaint has the plaintiff alleged any right flowing from the Federal Statute. The suit is based on malicious prosecution, false arrest and deformation of character. These are all state created actions and have no connection with any Federal right. Furthermore, although there were Federal officers involved in that they arrested the plaintiffs, there

is no allegations against these Federal Agents. Also of note, is that it is defendants' petition which first asserts any Federal Statute. In their petition, the defendants allege that plaintiffs' cause of action depends upon Title 49, United States Code, Section 1374 (b). But there is no mention in plaintiffs' complaint of this Statute. There is no assertion that they based their claim under this Statute. Defendants sole evidence for their contention of a Federal claim is that the plaintiffs in their complaint, at one point stated that defendants were discriminating against them and depriving them of their rights. So that circumstances of this so-called assertion of discrimination and deprivation of rights by the plaintiffs deserve examination for a determination whether this is an assertion of a Federal right. The circumstances are that in Paragraph "9" of the complaint plaintiffs' state that at the time when the original incident took place they told the defendant, EDWIN GLASSER, that he was prejudiced against the plaintiffs and further, that in Paragraph "12" plaintiffs state that again at time of the original incident, they argued that their Civil rights were being violated. These two paragraphs are not assertions of Federal claim, rather, they are simply statements of what plaintiffs stated to the defendant at time of the original incident aboard the aircraft. The defendants are seeking to show Federal jurisdiction not by any allegations made by the plaintiffs, but by the fact that in their

complaint, they mention what transpired during the incident on the aircraft. If defendants' contention were upheld, this would result in a truly curious situation. The plaintiffs would be held to have asserted a Federal claim which could be the basis of Federal jurisdiction prior to the beginning of a lawsuit. The fact that plaintiffs included in their complaint their statements made to the defendant at the time of the original incident, should not be the cause for a decision upholding Federal jurisdiction.

As stated in the case of Standage Ventures, Inc., vs. Arizona, (499 F 2nd 248, 1974, CA 9 Arizona):

> "To entitle party to remove a case from State Court to Federal District Court, under Title 28, United States Code, Section 1441 (b) on grounds that action arises under Laws of the United States, complaint must expressly allege Law of the United States that is directly or indirectly involved in the dispute."

Since plaintiff did not so expressly allege any Federal claim arising from the Federal Law, there was no Federal question jurisdiction, under Title 28, United States Code, Section 1441 (b). Without such jurisdiction the removal to the Federal District Court, in all respects, was improper. This means that all the proceedings held in the Federal District Court are null and void. Therefore, the Court had no power to make the judgment of December 19, 1974 and said judgment must be declared void.

It is of crucial importance that in neither the judg-

ment nor the Findings of Fact nor Conclusions of Law of December 19, 1974, was there any finding as to the Court's subject matter jurisdiction over this action. Due to this, the issue of the Court's jurisdiction over this matter is still open. It is up to this Court, at this time, pursuant to this Rule 60b (4) motion to now review the circumstances surrounding the removal of this case to the Federal District Court. If as stated herein the Court finds that there was no subject matter jurisdiction, then the relief herein sought to set aside the judgment as void should be granted. To allow the plaintiffs a remedy due to the improper removal had in this action, plaintiffs should also be given leave to seek redress in the State Court.

POINT II

THE INSTANT MOTION TO SET ASIDE THE JUDGMENT AS VOID IS IN ALL RESPECTS TIMELY.

As stated in the statement had in this memorandum, there has been numerous proceedings in this action. There has already Rule 60 motion and an appeal which was later dismissed. This, however, does not destroy the timeliness of this new Rule 60 motion.

The time limit on Rule 60 motion is stated in Part (b). It there states: "the motion shall be made within a reasonable time, and for reasons (1), (2), and (3), not more than one year after the judgment Order or proceeding was

entered or taken. As to the ground herein alleged (4) that the judgment is void, there is no such limitation. There is no time limit on an attack on a judgment as void. (Misco Leasing, Inc. vs. Vaughn, C.A. 10th, 1971, 450 F 2nd 257; Taft vs. Donellan Jerome, Inc., C.A. 7th 1969, 407 F. 2nd 807. Bookout vs. Beck, C.A. 9th, 1965, 354 F. 2nd 823). In Court of Appeals, Second Circuit Case, Crosby vs. Bradstreet Company, 312 F. 2nd 483, 1963, Certiorary denied 83 S. CT. 1300. The Court vacated a judgment as void thirty years after entry.

The motion here challenges the inherent power of the Court over this action. Such challenges to the subject matter jurisdiction of a Court are never waivable and are presentable at any time (Capron vs. Vannoordon, 6 US 126, 1804). They are presentable for the first time on appeal (Florida Line vs. Jacobson, 169 F. Supp. 774, reversed on other grounds, 80 S. CT. 568, 1960). In fact, many cases have held that the Court should raise the issue of jurisdiction on its own motion. In Clark vs. Tall Grey, Inc., 59 S. CT. 744, 1939, the Supreme Court said, it had a duty to raise the question as to jurisdiction where it appeared doubtful, even where the District Court jurisdiction had not been challenged.

It is clear, therefore, that the jurisdictional challenge is presentable at any time in the course of a law suit. The only restriction is that once a Court determines that it has jurisdiction of the subject matter, such determina-

tion is res judicata on that issue, if the jurisdictional question actually was litigated and decided. (Durfee vs. Duke 1963, 84 S. CT. 242; Stoll vs. Gottlieb, 1938, 59 S. CT. 134) In the instant case there was no finding as to the Court's own jurisdiction of this issue. The Judgment, Findings of Fact and Conclusions of Law entered December 19, 1974 make no mention whatsoever of the jurisdictional issue. The issue of the Court's subject matter jurisdiction, therefore, has never been litigated. It, therefore, is presentable at this time and the Court has a duty to determine the issue.

CONCLUSION

The instant motion pursuant to Rule 60 (b) (4) to set aside the judgment as void for lack of subject matter jurisdiction is timely and should be granted with an additional leave for the plaintiffs to seek their remedy in the State Courts.

AFFIDAVIT OF WM. J. JUNKERMAN IN OPPOSITION

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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GILBERTO GERENA VALENTIN, et al.,

Plaintiffs, AFFIDAVIT IN OPPOSITION

-against-

PAN AMERICAN WORLD AIRWAYS, INC. and EDWIN H. GLASER, 73 C. 1552

Defendants.

- -

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

WILLIAM J. JUNKERMAN, being duly sworn, deposes and says:

1. I am an attorney-at-law and a member of the firm of Haight, Gardner, Poor & Havens, attorneys for defendant Pan American World Airways, Inc. (hereinafter "Pan American") in the above-captioned action, and I am fully familiar with all of the facts and circumstances set forth herein. I make this affidavit in opposition to plaintiffs' motion pursuant to Rule 60 (b) (4) of the Federal Rules of Civil Procedure to set aside the judgment, findings of fact and conclusions of law entered herein on December 19, 1974.

2. Prior to going into specifics, your deponent first of all must categorically state that the present application of the plaintiffs is truly incredible and amounts to a

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contemptuous disregard of the Orders of this Court that have been handed down in this case.

3. Your deponent has no intention of wasting the time of this Court by reciting in detail the procedural history of this case when this history has been set forth at length in the prior affidavit submitted by defendant in opposition to the plaintiffs' first Rule 60 motion. Suffice it to say that on December 16, 1974, the plaintiffs and their attorney failed to appear for the peremptorily ordered trial of this action. This action was thereupon dismissed by this Court pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for failure to prosecute by an order dated December 19, 1974, which was accompanied by findings of fact and conclusions of law. Thereafter, the plaintiffs took no appeal from this Court's order of December 19, 1974, but instead moved on December 9, 1975, almost one year later, to set aside the judgment of December 19, 1974, pursuant to Rule 60 of the Federal Rules of Civil Procedure. After argument of the plaintiffs' motion on December 19, 1975, this Court summarily denied the plaintiffs' motion by an Order of the same date. The plaintiffs thereupon on January 15, 1976, filed a notice of appeal from this Court's order of December 19, 1975. This appeal was dismissed by the United States Court of Appeals for the Second Circuit on March 12, 1976.

4. Nevertheless, undaunted by the previous orders

of this Court and of the Court of Appeals, the plaintiffs now, once again, seek to have this Court's order of December 19, 1974 set aside pursuant to Rule 60 of the Federal Rules of Civil Procedure. In the memorandum of law which accompanies this latest application, the plaintiffs' attorney argues that this motion is timely since it is based on Rule 60(b)(4). This assertion, however, ignores the fact that the plaintiffs have already made a prior motion to this Court based upon Rule 60. Are the plaintiffs to be allowed to make an endless stream of Rule 60 motions, each one based on a different provision of that rule?

5. The only purported basis for the plaintiffs' latest attempt to persuade this Court to set aside its judgment of December 19, 1974 is the assertion that this Court lacked subject matter jurisdiction of this action. It is also the contention of the plaintiffs that the issue of lack of subject matter jurisdiction has never been raised previously in this action. Both of these contentions of the plaintiffs are clearly and unequivocally wrong.

6. Most importantly, it is inconceivable that the plaintiffs dare to assert that the issue of lack of subject matter jurisdiction has never been raised previously in this action. As will be demonstrated below, this issue was specifically raised in the plaintiffs' prior Rule 60 motion, and was virtually the only issue raised in the plaintiffs' appeal

of this Court's denial of the plaintiffs' first Rule 60 motion.

7. In paragraph 8 of his affidavit submitted in support of the latest Rule 60 motion, the plaintiffs' attorney states that "the question of Federal jurisdiction has never been raised before in this case." This erroneous statement of the plaintiffs' attorney is contradicted by his own words, since in paragraph 4 of his affidavit he admits that he raised the issue of lack of subject matter jurisdiction in his prior Rule 60 motion. In this regard, accompanying this affidavit as "Exhibit A' is a copy of paragraph 33 of the plaintiffs' attorney's affidavit submitted in support of his original Rule 60 motion, which clearly underscores the fact that the issue of lack of subject matter jurisdiction previously had been submitted for consideration by this Court. As was pointed out in defendant's affidavit submitted in opposition to the plaintiffs' first Rule 60 motion, defendant petitioned for removal of this action to the Federal District Court in Puerto Rico on June 25, 1973 pursuant to 49 U.S.C. 1374(b). Plaintiffs' attorney in Puerto Rico did not oppose this petition by moving to remand, and later consented to defendant's motion for a change of venue to the Eastern District of New York. Therefore, a basis for Federal jurisdiction of this action was first proposed by defendant on June 25, 1973, and went totally unquestioned until December 9, 1975 when plaintiffs brought their first Rule 60 motion, a period of two and half years. It also need hardly be

emphasized that the plaintiffs' questioning of this Court's jurisdiction did not come until after this case had been dismissed for lack of prosecution.

8. Since plaintiffs' original Rule 60 motion was summarily denied by this Court, this denial perforce represented an adjudication, against the plaintiffs, of all grounds asserted by the plaintiffs in that motion for the setting aside of this Court's judgment of December 19, 1974. At the very least, the papers submitted by the plaintiffs' attorney in support of his first Rule 60 motion reveal that the plaintiffs have had the opportunity to contest subject matter jurisdiction. Under these circumstances, as is demonstrated in the accompanying memorandum of law, the plaintiffs must be regarded as precluded from asserting this issue by way of the present motion.

9. Even more fatal to the plaintiffs' present application, however, is the history of the plaintiffs' appeal of this Court's denial of this first Rule 60 motion to the Second Circuit. Pursuant to a Civil Appeal Scheduling Order issued by the Clerk of the Second Circuit, a Pre-Argument Conference on the plaintiffs' appeal was held on February 27, 1976, before Nathanial Fensterstock, staff counsel to the Second Circuit. At that Pre-Argument Conference, the plaintiffs' attorney specifically asserted that federal court subject matter jurisdiction was lacking in this case. At the end of that conference, Mr. Fensterstock indicated to the plaintiffs' attorney that he

believed the appeal was without merit, and he suggested that the appeal be discontinued.

10. Apparently not satisfied with the advice of Mr. Fensterstock, the plaintiffs' attorney wrote a letter to Mr. Fensterstock dated March 1, 1976, requesting a further Pre-Argument Conference for the sole purpose of allowing the plaintiffs' attorney to again assert his argument regarding lack of subject matter jurisdiction. A copy of the plaintiffs' attorney's letter of March 1, 1976, to Mr. Fensterstock is hereto annexed as "Exhibit B".

11. The plaintiffs' attorney's request for another Pre-Argument Conference was apparently rejected by Mr. Fensterstock, since on March 4, 1976, the plaintiffs' attorney served a notice of motion and accompanying affidavit for an extension of time for the filing of the appellant's brief and joint appendix. A copy of this notice of motion and affidavit is hereto collectively annexed as "Exhibit C". As an examination of the plaintiffs' motion for an extension of time will clearly reveal, the motion was based solely upon the ground that the plaintiffs' attorney wanted further time to research and present to the Court of Appeals his argument regarding lack of subject matter jurisdiction. Defendant naturally opposed the plaintiffs' attorney's application for an extension of time, and in his reply affidavit the plaintiffs' attorney again emphasized the issue of alleged lack of subject matter jurisdiction. A copy

of the plaintiffs' attorney's reply affidavit is hereto annexed as "Exhibit D".

12. Therefore, the issue of alleged lack of subject matter jurisdiction was specifically presented to the Court of Appeals for its consideration. As previously indicated, the Second Circuit denied the plaintiffs' attorney's request for an extension of time to file his brief, and implicit in this denial is a rejection by the Second Circuit of the plaintiffs' argument regarding lack of subject matter jurisdiction. A copy of the Order of Judge Gurfein denying the plaintiffs' motion for an extension of time is hereto annexed as "Exhibit E". On March 12, 1976, the Court of Appeals followed its order denying the plaintiffs' attorney's motion for an extension of time by filing an order dismissing the plaintiffs' appeal of this Court's denial of their original Rule 60 motion. A copy of the Second Circuit's Order of March 12, 1976 is hereto annexed as "Exhibit F".

13. From the foregoing, it is evident that virtually the only issue that was raised by the appellants' attorney on their appeal of this Court's denial of their first Rule 60 motion was the issue of lack of subject matter jurisdiction. Yet it is still their attorney's contention that this issue has never been raised before in this litigation! To allow the plaintiffs to raise once again this issue in the present motion would be tantamount to rendering a nullity the action of the

Second Circuit in dismissing the plaintiffs' prior appeal.

14. Having thus presented the issue of lack of subject matter jurisdiction both to this Court and to the Second Circuit, as is demonstrated in the accompanying memorandum of law the plaintiffs are now precluded by the doctrine of res judicata from raising the issue of lack of subject matter jurisdiction again in the present application.

15. The plaintiffs' attorney in the present application has also repeated the argument that was raised before the Court of Appeals that Section 404(b) of the Federal Aviation Act of 1958, 49 U.S.C. 1374(b), is an administrative statute that does not afford a basis for federal court subject matter jurisdiction. The plaintiffs are precluded from raising this argument again by the doctrine of res judicata since this issue was obviously determined adversely to the plaintiffs by the dismissal of their appeal by the Second Circuit. At any rate, as is demonstrated in the accompanying memorandum of law, the plaintiffs' attorney's assertion regarding the nature of 49 U.S.C. 1374(b) is clearly wrong, since under numerous decisions it has been held that this statute provides a private remedy and constitutes a basis for federal court subject matter jurisdiction.

16. Finally, it must be emphasized by your deponent that the interests of justice require that the plaintiffs' present motion should be summarily denied by this Court. On Dec-

ember 16, 1974, defendant Pan American fully prepared to try this case on the peremptorily ordered trial date, including arranging for the presence in court of several witnesses gathered from great distances. When the plaintiffs failed to appear on that trial date, this Court granted defendant's motion to dismiss for failure to prosecute, a dismissal that defendant was clearly entitled to under the circumstances. Defendant repeated to this Court the numerous reasons upon which defendant was entitled to this dismissal when the plaintiffs made their first motion, nearly one year later, to vacate this Court's judgment of December 19, 1974, and obviously this Court agreed with defendant's arguments when it summarily denied the plaintiffs' first Rule 60 motion. Thereafter, the Court of Appeals implicitly lent its approval to this Court's handling of this case by its dismissal of the plaintiffs' appeal from this Court's order denying the plaintiffs' original Rule 60 motion. In preparing for the trial of this action, and in opposing the attempts of the plaintiffs to circumvent and overcome this Court's order of December 19, 1974, Pan American has, inevitably, incurred great expense in terms of attorneys' fees and production of witnesses for trial. Despite the apparent contrary belief of the plaintiffs and their attorney, it is a fact that all litigation must end sometime, and it is thus respectfully submitted that this Court should finally and unequivocally terminate this action by summarily denying the

plaintiffs' latest application for relief.

WHEREFORE, for all of the foregoing reasons, it is respectfully submitted that the plaintiffs' application to set aside this Court's judgment of December 19, 1974 and for other relief should be in all respects denied.

William J. Junkerman

Sworn to before me this
17th day of May, 1976

s/ Betty G. Yanok
Notary Public

MEMORANDUM OF LAW IN OPPOSITION

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

. x

GILBERTO GERENA VALENTIN, et al.,

Plaintiffs,

-against- 73 C. 1552

PAN AMERICAN WORLD AIRWAYS, INC. and EDWIN H. GLASER,

Defendants.

. x

MEMORANDUM OF LAW

STATEMENT

This memorandum of law is submitted in opposition to the plaintiffs' motion to set aside this Court's judgment of December 19, 1974 pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure. The facts of this case, which clearly support defendants' contention that the plaintiffs' latest application should be denied, are fully developed in the accompanying affidavit of William J. Junkerman.

It is the purpose of this memorandum to demonstrate that the plaintiffs, having had both the

opportunity to raise the issue of lack of subject matter jurisdiction in this action and having specifically raised this issue, are precluded by the doctrine of res judicata from asserting this issue once again in the present application. It is also the purpose of this memorandum to demonstrate that § 404(b) of the Federal Aviation Act of 1958, 49 U.S.C. 1374(b), provides a private remedy and constitutes a valid basis for federal court subject matter jurisdiction.

POINT I

THE PLAINTIFFS, HAVING HAD THE OPPORTUNITY TO RAISE THE ISSUE OF LACK OF SUBJECT MATTER JURISDICTION, ARE PRECLUDED FROM RAISING THIS ISSUE IN THE PRESENT APPLICATION

As is demonstrated in the accompanying affidavit of William J. Junkerman, the motion papers submitted by the plaintiffs' attorney in support of his first motion pursuant to FRCP 60 to set aside this Court's judgment of December 19, 1974 clearly raised the argument that this Court lacked subject matter jurisdiction in this action. Consequently, since that first motion was denied

by this Court and the appeal of that denial was dismissed by the Second Circuit, it is evident that the plaintiffs must be regarded as precluded from raising this issue again in the present motion under the doctrine of res judicata. This point is developed more fully in Point II of this memorandum of law. Moreover, at the very least, the plaintiffs' attorney's motion papers submitted on the prior Rule 60 motion reveal that the plaintiffs have had the opportunity to raise the issue of lack of subject matter jurisdiction. Having failed in this opportunity, the plaintiffs must now be regarded as precluded from raising this issue by the present application.

The scope of the doctrine of res judicata is succinctly set forth in 30 American Jurisprudence, § 179, at page 923, as follows:

> "The phase of the doctrine of res judicata precluding subsequent litigation of the same cause of action is much broader in its application than a determination of the questions involved in the prior action; the conclusiveness of the judgment in each case extends not only to matters actually determined, but also to other matters which could properly have been determined in the prior action. This rule applies to every question falling within the purview of the original action, in respect to matters of

both claim and defense, which could have been presented by the exercise of due diligence."

(Emphasis supplied)

In numerous cases, it has been recognized that the proposition that the doctrine of res judicata acts as a bar to the litigation of an issue which a party had a prior opportunity to contest applies when the issue involved is subject matter jurisdiction. Johnson v. Muelberger, 340 U.S. 581 (1951); Sherrer v. Sherrer, 334 U.S. 343 (1947); Jackson v. Irving Trust Co., 311 U.S. 494 (1941); Chicot Co. Drainage Dist. v. Baxter State Bank,308 U.S. 371 (1940); O.F. Nelson & Co. v. United States, 169 F.2d 833 (9th Cir. 1948). Most significantly, this issue has been specifically considered on several occasions by the United States Court of Appeals for the Second Circuit, and in each case the Second Circuit has held that the failure to raise the issue of lack of subject matter jurisdiction precludes assertion of this issue in subsequent litigation. In United States v.Eastport Steamship Corp., 255 F.2d 795 (2d Cir. 1958), the Second Circuit was concerned with a suit by the

Government to recover charter hire allegedly owed by the defendant under a charter party. The defendant raised, as one defense, a previous judgment in its favor by the Court of Claims. In an attempt to circumvent this defense, the Government argued that the Court of Claims lacked jurisdiction to consider an action founded upon a judgment previously rendered by it. In disposing of this argument, the Second Circuit held as follows:

> ". . . Suggestion has been made that the Court of Claims lacks jurisdiction to consider an action founded upon a judgment previously rendered by it. . . . This issue was not presented to the Court of Claims by these parties. Nevertheless, we need not inquire into the merit of this suggestion because collateral attack upon the Court of Claims judgment on this ground is also foreclosed. With few exceptions a collateral attack upon the subject matter jurisdiction of a court in which both parties have appeared is prohibited notwithstanding the failure of the parties to litigate the issue. . . ."

255 F.2d at 803. Accord, Smith v. Allegheny Corp., 394 F.2d 381, 391 (2d Cir. 1968), cert denied, 393 U.S. 939 (1968).

It is therefore readily apparent that a court must deny a motion to vacate a final judgment when this motion is based on a ground which the

moving party has had an opportunity to litigate in the prior proceeding. The effect of this rule upon the issue of lack of subject matter jurisdiction is succinctly set forth by Wright and Miller in their discussion of the motion to vacate pursuant to Rule 60(b)(4):

> "It must be noted however, that a court has jurisdiction to determine its own jurisdiction. Thus if defendant has challenged the court's jurisdiction over his person and this issue has been resolved against him by a final judgment, that judgment is not void, but is res judicata on the issue of jurisdiction. By the same token, a court's determination that it has jurisdiction of the subject matter is res judicata on that issue, if the jurisdictional question actually was litigated and decided, or if a party had an opportunity to contest subject matter jurisdiction and failed to do so."
>
> (Emphasis supplied)

Wright & Miller, Federal Practice and Procedure: Civil § 2862, Vol. 11 at P. 201.

As an examination of the plaintiffs' attorney's motion papers with relation to the plaintiffs' first Rule 60 motion clearly reveals, the plaintiffs and their attorney, at the very least, have had ample opportunity to contest subject matter jurisdiction, not only in that

motion but also in the time between defendant's removal of this action to federal court on June 25, 1973 and the time that this action was dismissed for failure to prosecute on December 19, 1974. This Court having rendered a final judgment dismissing this case and having denied summarily the plaintiff's first Rule 60 motion, the plaintiffs are precluded by the doctrine of res judicata from asserting the issue of lack of subject matter jurisdiction in the present application.

POINT II

HAVING SPECIFICALLY RAISED THE ISSUE OF LACK OF SUBJECT MATTER JURISDICTION IN THE APPEAL OF THIS COURT'S DENIAL OF THE PLAINTIFFS' FIRST RULE 60 MOTION, THE PLAINTIFFS ARE BARRED BY THE DOCTRINE OF RES JUDICATA FROM RELITIGATING THIS ISSUE

Irrespective of the question of whether the plaintiffs raised the issue of lack of subject matter jurisdiction before this Court in their first Rule 60 motion, it is beyond dispute that this issue was specifically raised by the plaintiffs

before the Second Circuit in their appeal of this Court's denial of that motion. In fact, as is described more fully in the accompanying affidavit of William J. Junkerman, subject matter jurisdiction was virtually the only issue raised by the plaintiffs in that appeal. The Court of Appeals having thus had the issue of subject matter jurisdiction presented to it, and having dismissed the plaintiffs' appeal, it is apparent that the plaintiffs are barred by the doctrine of res judicata from relitigating this issue before this Court. As the plaintiffs themselves are forced to admit in their memorandum of law submitted with respect to the present application, under legion decisions it has been held that issues of jurisdiction, including subject matter jurisdiction, may be, as any other matter, the subject of res judicata, thus precluding relitigation. Durfee v. Duke, 375 U.S. 106 (1963); Jackson v. Irving Trust Co., 311 U.S. 494 (1941); Stoll v. Gottlieb, 305 U.S. 165 (1938); Davis v. Davis, 305 U.S. 32 (1938).

POINT III

49 U.S.C. 1374(b) PROVIDES A PRIVATE REMEDY AND CONSTITUTES A BASIS FOR FEDERAL COURT SUBJECT MATTER JURISDICTION

In his affidavit submitted in support of the present motion, the plaintiffs' attorney repeats the argument he made before the Second Circuit that the statute set forth in the defendants' petition for removal of June 25, 1973, 49 U.S.C. 1374(b), does not constitute a basis for federal court subject matter jurisdiction. Since the plaintiffs' attorney raised this same argument before the Second Circuit on his appeal of this Court's denial of his first Rule 60 motion, as the previous points of this memorandum of law demonstrate, the plaintiffs are now precluded by the doctrine of res judicata from raising this same argument again. However, in any case, examination of the court decisions concerning 48 U.S.C. 1374(b) clearly demonstrates that this statute does indeed afford a basis for federal court subject matter jurisdiction.

Contrary to the plaintiffs' assertion that there are "few" cases on this point, this specific point has in fact been litigated on numerous

occasions, with the leading decision being that of the Second Circuit in Fitzgerald v. Pan American World Airways, 229 F.2d 499 (2d Cir. 1956). In that action, the plaintiffs sued defendant Pan American for damages for refusing to allow the plaintiffs to board a Pan American flight in Honolulu, Hawaii. Both subject matter jurisdiction and the plaintiffs' cause of action were based on § 404(b) of the Federal Aviation Act of 1958, 49 U.S.C. 484(b) (now 1374(b)). No diversity of citizenship was alleged in the plaintiffs' complaint, as it appeared that both the plaintiffs and defendant were citizens of the State of New York. The Second Circuit reversed the District Court's decision granting defendant's motion to dismiss for lack of subject matter jurisdiction, and held that § 404(b) of the Federal Aviation Act provides both a basis for federal court subject matter jurisdiction and a private right of action for damages. In so deciding, the court stated as follows:

> ". . . We think [§ 404(b)] created a new federal right. Although a right created by a federal statute covers the same ground as a right already existing under the common law of the states and

> territories, a suit based on that federal statute is one 'arising under' a law of the United States, so that a federal district court has jurisdiction under 28 U.S.C. § 1331."

229 F.2d at 501-502. Accord, Nader v. Allegheny Airlines, Inc., 512 F.2d 527 (D.C. Cir. 1975); Archibald v. Pan American World Airways, 460 F.2d 14 (9th Cir. 1972); Mortimer v. Delta Air Lines, 302 F.Supp. 276 (N.D. Ill. 1969); Town of East Haven v. Eastern Air Lines, Inc., 282 F. Supp. 507 (D. Conn. 1968); Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961).

The statute proposed by defendant Pan American as a basis for federal court subject matter jurisdiction in this action is the same statute that was held by the Second Circuit in Fitzgerald to constitute a valid basis for federal court subject matter jurisdiction, and consequently the plaintiffs' attorney's assertion that this statute is a mere administrative remedy is clearly wrong. The one case cited by the plaintiffs' attorney, Eisman v. Pan American World Airlines, 336 F. Supp. 543 (E.D. Pa. 1971), concerned a dispute over airline rates not airline services, and the district court

specifically distinguished the Fitzgerald line of cases on that basis. 336 F. Supp. at 550.

CONCLUSION

The plaintiffs' latest application to set aside this Court's judgment of December 19, 1974, should be denied in all respects.

Respectfully submitted,

HAIGHT, GARDNER, POOR
& HAVENS
Attorneys for Defendant
Pan American World Airways, Inc.
One State Street Plaza
New York, N. Y. 10004

WILLIAM J. JUNKERMAN,
WILLIAM F. MARTIN JR.,
Of Counsel

REPLY AFFIDAVIT OF LORENZO F. PADILLA

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- -X

GILBERTO GERENA VALENTIN, et al :

Plaintiff, : 73 C 1552
REPLY AFFIDAVIT

- against - :

PAN AMERICAN WORLD AIRWAYS, INC. and EDWIN H. GLASER, :

Defendants. :

- -X

STATE OF NEW YORK

COUNTY OF NEW YORK ss.:

LORENZO F. PADILLA, being duly sworn, deposes and says:

1. I am the attorney for the plaintiff herein and I submit this affidavit in reply to the affidavit in opposition of WILLIAM J. JUNKERMAN and accompanying memorandum of law, and in support of Plaintiff's motion to set aside the judgment against the plaintiff herein.

2. In his opposition papers, defendant's attorney fails to realize the distinction between actually raising an issue and mere mentioning of an issue. In plaintiff's first Rule 60 motion, plaintiff's attorney only mentioned a subject matter jurisdictional issue, in citing that the Federal Court's jurisdiction over this action appeared suspect. This simple statement did not present the issue of subject matter jurisdiction for a determination by this court. It was not an asserted ground for setting aside the judgment; the grounds asserted

were excusable neglect and fraud.

3. Secondly, this issue was not raised in the Court of Appeals for the Second Circuit. As defendant's attorney states, plaintiff requested an extension of time so that he might assert his challenge to the subject matter jurisdiction of the court. This extension of time was not granted. Plaintiff's appeal was dismissed, not because of any lack of merit as to its subject matter jurisdictional arguement but solely on the basis of failure to file the briefs and joint appendix within the scheduled time. Thus, the missue of subject matter jurisdiction was again never raised.

4. Defendant in his memorandum of law states;

> "A court's determination that it has jurisdiction over the subject matter is res-judicata on that issue, if the jurisdictional question actually was litigated and decided, or if a party had an opportunity to contest subject matter jurisdiction and failed to do so."

5. As shown in the previous two paragraphs, the subject matter jurisdiction issue was actually never litigated. Secondly, plaintiff did not have an ample opportunity to contest subject matter jurisdiction. Plaintiff never waived his rights to challenge subject matter jurisdiction. The first Rule 60 motion for excusable neglect and fraud had to be made within one year. A challenge to subject matter jurisdiction can be made at any time, there is no waiver of a challenge to subject matter jurisdiction.

6. Finally, on this point, in his memorandum of law, defendant cites numerous cases wherein, "the doctrine of res-judicata acts as a bar to the litigation of an issue which a party had a prior opportunity to contest," and that it "applies when the issue involved is subject matter jurisdiction," and seeks to apply these cases to the case at bar. This is totally improper. All the cases cited, deal with a collateral attack in a second action of the subject matter jurisdiction of the court in a prior action. In that situation, the judgment in the first action would, of course, be res-judicata on the issue of subject matter jurisdiction. But this has no application to the within action. Here the attack is not the collateral one, but a direct one by a Rule 60 motion. Here the jurisdiction challenge is not made in a subsequent action but in the same action. Therefore, the jurisdictional challenge is properly interposed in this action.

WHEREFORE, this deponent respectfully requests that plaintiff's motion to set aside this court's judgment of December 19, 1974 be granted together with all further relief deemed just and proper.

LORENZO F. PADILLA

Sworn to before me this
day of May , 1976

LOUIS ROSEN
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-3348550
Qualified in Queens County
Term Expires March 30, 19 77

ORDER OF JUDGE BRUCHHAUSEN DENYING MOTION, DATED 5/21/76

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GILBERTO GERENA VALENTIN, JOSE ANTONIO PONTE VAZQUEZ, GEORGE E. FLORES-RUIZ, CARLOS REYES LOPEZ and JOSEPH MENDEZ RIVERA,

Plaintiffs,

- against -

NOTICE OF MOTION

PAN AMERICAN WORLD AIRWAYS, INC., and EDWIN GLASSER,

Defendants.

TO: WRIGHT, GARDNER, ROSS & MOSKOWITZ
Attorneys for Defendants

This motion is hereby in all respects denied. It is so ordered.
Walter R. Bruchhausen
Senior U.S.D.J. 5/21/76

PLEASE TAKE NOTICE, that upon the annexed affidavit of the plaintiff, GILBERTO GERENA VALENTIN, sworn to the 16th day of April 1976, and the affidavit of LORENZO E. PADILLA, ESQ., sworn to the 29th day of April 1976, and upon the annexed exhibits, and upon the pleadings and proceedings had herein, and upon all the records and proceedings had in this action, the undersigned will move before the HON. WALTER BRUCHHAUSEN, United States District Court Judge, at the courthouse in the United States Court House located at Pierrepont Plaza, Brooklyn, County of Kings, City and State of New York, for the Eastern District of New York, on the 21st day of May 1976, at 10:00 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 56 (b), [illegible] that no

BEST COPY AVAILABLE